TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 497.

[redacted] OREGON COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

FILED JULY 24, 1908.

(27,814)

(27,814)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 457.

OGLESBY GROCERY COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 7, 1920.

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1 UNITED STATES OF AMERICA,
Northern District of Georgia,
Northern Division.

Indictment. No. 3754.

THE UNITED STATES

vs.

OGLESBY GROCERY COMPANY, a Corporation, Fulton County.

In the District Court of the United States in and for the Division and District Aforesaid, at the March Term Thereof, A. D. 1920.

The Grand Jurors of the United States, impaneled, sworn, and charged at the Term aforesaid, of the court aforesaid, on their oath present, that Oglesby Grocery Company, a Corporation, on the 13th day of April, in the year 1920, in the said division of said district, and within the jurisdiction of said court, while doing business as a wholesale grocer in the City of Atlanta, in the State of Georgia, during the existence of a state of war between the United States of America, and the German Government, did then and there unlawfully and wilfully make an unjust and unreasonable charge in handling and dealing in certain necessaries, to-wit: granulated sugar. That is to say that at the time and place aforesaid the said Oglesby Grocery Company did sell, at wholesale, to R. L. Lamb, acting for the Lamb & Nix Grocery Co., a retail dealer, one barrel of granulated sugar and did make a charge of twenty cents per pound therefor when and while seventeen and three-fourths cents per pound then and there was a just and reasonable charge for said sugar, and any charge in excess of seventeen and three-fourths (17¾) cents per pound therefor then and there was excessive, unjust and unreasonable, the said Oglesby Grocery Company, lately theretofore having purchased the said sugar from the Savannah Sugar Refining Company at the price of sixteen cents per pound on board cars at Savannah, Georgia, and the transportation charges thereon from Savannah to Atlanta being twenty-six and nine-tenths (26.9) cents per hundred pounds, all of which the said Oglesby Grocery Company then and there well knew.

2 Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Second Count.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present, that the said Oglesby Grocery Company, a Corporation, on the 13th day of April, in the year 1920, in the said division and district, and within the jurisdiction of said court, while doing business as a wholesale grocer in the City of Atlanta, in the State of Georgia, during the existence of a state of war between the United

States of America and the German Government, did then and there unlawfully and wilfully make an unjust and unreasonable charge in handling and dealing in a certain necessary, to-wit: granulated sugar. That is to say, that at the time and place aforesaid the said Oglesby Grocery Company did sell, at wholesale, to J. M. Phelps, acting for Phelps Brothers Grocery Company, Three hundred and forty-nine (349) pounds of granulated sugar and did make a charge of twenty cents per pound therefor when and while seventeen and three-fourths (17¾) cents per pound then and there was a just and reasonable charge for said sugar, and any charge in excess of seventeen and three-fourths (17¾) cents per pound therefor then and there was excessive, unjust and unreasonable, the said Oglesby Grocery Company, lately theretofore, having purchased the said sugar from the Savannah Sugar Refining Company at the price and charge of sixteen cents per pound on board cars at Savannah, Georgia, and the transportation charges thereon from Savannah to Atlanta then and there being twenty-six and nine-tenths (26.9) per hundred pounds; all of which the said Oglesby Grocery Company then and there well knew.

Contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States.

3 Third Count.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present, that the said Oglesby Grocery Company, a corporation, on the 13th day of April, in the year 1920, in the said division and district, and within the jurisdiction of said court, while doing business as a wholesale grocer in the City of Atlanta, in the State of Georgia, during the existence of a state of war between the United States of America and the German Government, did then and there unlawfully and wilfully make an unjust and unreasonable charge in handling and dealing in a certain necessary, to-wit: granulated sugar. That is to say, that at the time and place aforesaid the said Oglesby Grocery Company did sell, at wholesale, to L. Frankel, acting for Chamberlin-Johnson-Du Bose Company, six hundred and sixty-seven (667) pounds of granulated sugar and did make a charge of twenty cents per pound therefor when and while seventeen and three-fourths (17¾) cents per pound then and there was a just and reasonable charge for said sugar, and any charge in excess of seventeen and three-fourths (17¾) cents per pound therefor then and there was excessive, unjust and unreasonable, the said Oglesby Grocery Company, lately theretofore, having purchased the said sugar from the Savannah Sugar Refining Company at the price and charge of sixteen cents per pound on board cars at Savannah, Georgia, and the transportation charges thereon from Savannah to Atlanta then and there being twenty-six and nine-tenths (26.9) per hundred pounds; all of which the said Oglesby Grocery Company then and there well knew.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

4

Fourth Count.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present, that the said Oglesby Grocery Company, a Corporation, on the 13th day of April, in the year 1920, in the said division and district, and within the jurisdiction of said court, while doing business as a wholesale grocer in the City of Atlanta, in the State of Georgia, during the existence of a state of war between the United States of America and the German Government, did then and there unlawfully and wilfully make an unjust and unreasonable charge in handling and dealing in a certain necessary, to-wit: granulated sugar. That is to say, that at the time and place aforesaid the said Oglesby Grocery Company did sell, at wholesale, to T. F. Moore three hundred and fifty (350) pounds of granulated sugar and did make a charge of twenty cents per pound therefor when and while seventeen and three-fourths (17¾) cents per pound then and there was a just and reasonable charge for said sugar, and any charge in excess of seventeen and three-fourths (17¾) cents per pound therefor then and there was excessive, unjust and unreasonable, the said Oglesby Grocery Company, lately theretofore, having purchased the said sugar from the Savannah Sugar Refining Company at the price and charge of sixteen cents per pound on board cars at Savannah, Georgia, and the transportation charges thereon from Savannah to Atlanta then and there being twenty-six and nine-tenths (26.9) per hundred pounds; all of which the said Oglesby Grocery Company then and there well knew.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

A true bill, March Term, 1920.

GEO. R. DONOVAN,
Foreman of Grand Jury.

HOOPER ALEXANDER,
United States Attorney.

5 (On back or cover of Indictment:) No. 3754. United States District Court, Northern Division, Northern District of Georgia. The United States vs. Oglesby Grocery Company, a Corporation, Fulton County. A True Bill. Geo. R. Donovan, Foreman Grand Jury. Filed April 29th, A. D. 1920. O. C. Fuller, Clerk, By Jon Dean Steward, Deputy Clerk. Hooper Alexander, U. S. Attorney. Witnesses: Jno. A. Manget, J. E. Raley, W. E. Phelps, R. L. Lamb, L. Frankel, T. E. Moore, F. D. Jones, K. K. Kelley.

Due and legal service on the within Indictment is hereby acknowledged for the Oglesby Grocery Company, a corporation, and all other and further service is hereby waived, this the 30th day of April, A. D. 1920.

EDGAR WATKINS,
Attorney for Oglesby Grocery Company, a Corporation, Defendant Herein.

6 *Demurrer to Indictment.*

And now comes Oglesby Grocery Company in its own proper person into court, and having heard the said indictment and each count thereof read, says that the said indictment and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law, and that it, the said Oglesby Grocery Company, is not bound by the law of the land to answer the same, or any count thereof, and this it is ready to verify; wherefore, for want of sufficient indictment in this behalf, the said Oglesby Grocery Company prays judgment, and that by the court it may be dismissed and discharged from the said premises in the said indictment specified.

EDGAR WATKINS,
WATKINS, RUSSELL & ASBILL,
Attorneys for the Defendant.

Filed in Clerk's Office, May 1st, 1920. O. C. Fuller, Clerk, by Jon Dean Steward, Deputy Clerk.

7 *Opinion of the Court.*

An indictment alleging an unjust and unreasonable charge in handling granulated sugar, a necessary, on April 13th, 1920, has been met by a general demurrer based in the supposed insufficiency of the Act of Congress of August 10th, 1917, regulating the production and distribution of food and fuel in the United States.

1. The war powers of Congress must be held to be equal to whatever is necessary to successfully prosecute a war and maintain the public safety. In modern wars not only armies and peoples, but industries must be mobilized. Every citizen and every dollar must fight. Economic control is as important as military. Disaster and discontent at home are as fundamental and vital as in the field. The powers of Congress, in time of war, are comparable to the police powers of the States in time of peace and equally incapable of fixed limits. No doubt is entertained of the original power to make this legislation.

2. It is contended that the war power has expired, and this exercise of it has fallen by the cessation of war. An armistice was signed with Germany on November 11th, 1918, and active fighting then ceased. The original Act says that its provisions

"Shall cease to be in effect when the existing state of war between the United States and Germany shall have terminated and the fact and date of such termination shall be ascertained and proclaimed by the President."

No such proclamation has been made by the President. Instead, numerous proclamations have been made by him since the armistice in enforcement of this Act. The Congress, itself, on October 22nd,

1919, amended the very section of it here in issue, and on
8 December 31st, 1919, enacted that its provisions as to domestic sugar should continue until June 30th, 1920, and as to other sugar until December 31st, 1920. The Congress and the President are the constitutional judges of states of war and peace and their decisions should be abided in patience by people and courts. No such abuse of constitutional power or neglect of constitutional duty is here apparent as to require interference by the courts. Kentucky Distilling Co., et al. v. United States, United States Supreme Court, October Term, 1919.

3. More serious is the contention that the provisions of Section 4, upon which the indictment is based, are too indefinite for enforcement. So far as material, they are:

"It is hereby made unlawful for any person * * * to make any unjust or unreasonable rate or charge * * * in handling or dealing in or with any necessaries; to conspire or combine with any other person * * * to exact excessive prices for any necessaries."

This language, while it discloses a legislative policy, is said to establish no practical standard of conduct, that ideas of reasonableness and excessiveness are so vague and variant that no dealer could tell whether his charges and prices were unlawful except by the subsequent opinion of a jury. A process of law which would condemn one to lose liberty or property for an act without having previously clearly denounced the act as a crime, would not seem to be due process. The subsequent opinion of a jury making that unlawful which could not before have been known to be so, would have all the oppressiveness of an ex post facto law. Cases are not wanting in which the very terms "reasonable" and "unreasonable" have been held to render criminal statutes too vague for judicial enforcement. Tozer
9 v. United States 52 Fed. 917; Hayes v. The State, 11 Ga. App. 371, and cases cited. On the other hand, where the statute is within legislative power, courts should be slow to say they cannot understand and enforce its provisions and should exhaust efforts at practical construction before doing so. Some uncertainty is inseparable from law and life. The jury is our established tribunal for solving uncertainties in the application of law to life. The Magna Charta declared:

"No free man shall be taken or imprisoned * * * save by the lawful judgment of his peers or the laws of the land."

seeming to express content at a condemnation by either. Probably all common law crimes were originally defined only by the common opinion of the people expressed in the verdicts of juries and judgments of courts. In civil matters today omitted stipulations in contracts are supplied by "reasonable time" or "substantial performance" judged of by a jury. In negligence cases juries are told that while the law lays down a standard of "reasonable and ordinary care and diligence," exactly what acts the defendant should have done or re-

frained from, in the exercise of such diligence, is for their judgment. The defendant keeps or looses his money accordingly. Every code of criminal laws contains many vague definitions of crime. There are none but statutory offenses in Georgia. Many of the standards set up by her penal code use the very term "reasonable" or others as loose, of the application of which the jury must judge, and these statutes are daily upheld and enforced. Section 40 forbids conviction generally where "it satisfactorily appears there was no evil design or intention or culpable neglect." In the law of homicide, Section 65 declares "for if there should have been an interval between the assault or provocation given and the homicide sufficient for the voice of reason and humanity to be heard of which the jury in all cases shall be the judge, the killing shall be attributed to deliberate revenge, and be punished as murder." In dealing with
10 homicide justified by fear of felony about to be committed on person or habitation, Section 71 declares "it must appear that the circumstances were sufficient to excite the fears of a reasonable man," an ideal perfectly known only to juries. And Section 75, says of justification "all other instances which stand upon the same footing of reason and justice as those enumerated, shall be justifiable homicide." By Section 103 "opprob-ious words and abusive language" may be shown in a case of assault and battery, "which may or may not amount to a justification according to the nature and extent of the battery all of which shall be determined by the jury." Section 922, dealing with arrests without warrant, requires a warrant to be seasonably secured and declares "and no such imprisonment shall be legal beyond a reasonable time allowed for this purpose." on pain of criminal punishment under Section 106. By Section 117 a railway employee "guilty of negligence either by omission of duty or by any act of commission in relation to the matters entrusted to him and about which he is employed from which negligence serious bodily injury occurs" is guilty of a felony. Section 704 makes criminal any person who acquires any money "by any fraud or ill practice in playing at any game," and Section 719 "any person using any deceitful means or artful practice, other than those which are mentioned in this Code, by which an individual, or a firm, or a corporation, or the public is defrauded and cheated." Section 381 makes criminal open lewdness, or any notorious act of public indecency tending to debauch the morals; Section 383, the keeping of a "common, ill-governed and disorderly house, to the encouragement of idleness, etc." Sections 385 and 386 deal with pictures and writings described as "obscene and indecent or tending to debauch the morals;" and 387 makes criminal the use of "obscene, vulgar or profane language" in the presence of a female and indecent or disorderly conduct in the presence of females on passenger-cars, street cars and other places of like character." Similar descriptions of crime are found in the Federal Penal Code, Sections 102, 211
11 and 212. It is evident that the standards of decency and propriety change with time and place. Under none of these statutes can a man know with certainty how his conduct will be judged by others.

Revised Statutes, Section 1342 makes to be military criminals any officer or soldier who (Art. 20) "behaves with disrespect towards his commanding officer" or who (Art. 23) "does not use his utmost endeavor to sup-ress a mutiny" or (Art. 25) "uses reproachful or provoking speech or gestures to another." By article 61 conviction may be had for "conduct unbecoming an officer and a gentleman," and by article 62 for "all disorders and neglects to the prejudice of good order and military discipline." Similar provisions occur in Revised Statutes Section 1624, as to the Navy. Convictions under these have been frequently upheld. Smith v. Whitney, 116 U. S. 167; Fletcher vs. United States 148 U. S. 84; Swaim v. United States, 165 U. S. 553; Carter v. McClaughry, 183 U. S. 365.

The Supreme Court in Standard Oil Company v. United States, 321 U. S. 1, 63, and United States v. American Tobacco Co., 221 U. S. 106, 179, 180, held the language of the antitrust Act of 1890 to condemn only "undue or unreasonable" restraints of trade. So construed the language of that Act is quite similar to that now under consideration. In Nash v. United States, 229 U. S. 376, it was said:

"Those cases may be taken to have established that only such contracts and combinations are within the Act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade. And thereupon it is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men."

Nevertheless the anti-trust Act was upheld as a sufficient criminal statute.

12 Evidently standards may exist in law or fact to which the legislature may refer, and the existence of them is a matter of importance. It must be noted that the Act of August 10th, 1917, is dealing with necessaries; articles that, by reason of their necessity, are in common use, dealt in continuously and everywhere. The range of prices and profits in them in time of peace is well established and well understood. The changes that occur in such prices and the causes therefor, are well known. The dealer is not in a novel venture. The descriptive words of the Act are thus defined by Webster: Unjust as "contrary to justice and right; wrongful:" Excessive as "exceeding what is usual and proper:" Unreasonable as "beyond the limits of reason or moderation; immoderate; exorbitant." Immoderate, in turn, means "exceeding just, usual, or suitable bounds." Exorbitant means "deviating from the normal or customary course; going beyone the rule or established limits of right or propriety." The words used by Congress in reference to a well established course of business fairly indicate the usual and established scale of charges and prices in peace times as a basis, coupled with some flexibility in view of changing conditions. The statute may be construed to forbid, in time of war, any departure

from the usual and established scale of charges and prices in time of peace which is not justified by some special circumstance of the commodity or dealer. Evidently increased costs of production and transportation would justify a corresponding increase in price, and necessarily increased expenses in the conduct of business would justify an increased charge for handling; but the existence and sufficiency of the justification is left, in each case, to the courts. This does not differ, in substance, from the situation arising under the Georgia homicide statutes which forbid generally the killing of a human being, but admit of justification and mitigations which are measured finally by the opinion of juries. The dealer
13 knows what was, in time of peace, usual and customary. Within that limit he is safe. He judges of the justification for departure from it at his own risk. That the usual and customary may serve as defining a crime was ruled in Omaechevarian v. Idaho, 246 U. S. 343.

Yet further, Section 5 provides:

"The President may in lieu of such unjust and unreasonable * * * charge * * * find what is a just and reasonable charge * * * and in any proceeding brought in any court such order of the President shall be prima facie evidence."

This provision is in connection with a system of licenses which was inaugurated by proclamation as to sugar and is still in force, but it need not necessarily be limited thereto, and such fair price finding made by the President, or his agencies may be available as evidence in a case such as this, not apparently based on Section 5. No force is perceived in the argument that the price finding is utterly void because no hearing is provided. The rates and prices fixed are made only prima facie evidence and a judicial hearing is afforded when the finding is brought into question. The price fixed is a practical guide to the dealer which, if observed, would no doubt in any case protect him from successful prosecution. If he departs from this as well as from what was usual and customary, he does so at the risk of what a court and jury may determine to be unjust and unreasonable or excessive under all the proven circumstances. While the statutory definition is vague, the subject matter would hardly admit of inflexible treatment.

In view of what has been said, it will not be held void for uncertainty, and the demurrer will be overruled.

This 6th day of May, 1920.

SAM'L H. SIBLEY,
U. S. Judge.

Filed in Clerk's Office May 6th, 1920. O. C. Fuller, Clerk, by Jon Dean Steward, Deputy Clerk.

14 *Order Overruling the Demurrer.*

Upon considering the demurrer to the indictment and the argument thereon, for the reasons expressed in an opinion filed herewith, the demurrer is overruled.

This 6th day of May, 1920.

SAM'L H. SIBLEY,
U. S. Judge.

Filed in Clerk's Office May 6th, A. D. 1920. O. C. Fuller, Clerk, by Jon Dean Steward, Deputy-clerk.

15 *Plea.*

The defendant, Oglesby Grocery Company waives arraigment and pleads not guilty in open Court, this 3 day of June, 1920.

OGLESBY GROCERY COMPANY,
By EDGAR WATKINS,
Att'y.

Verdict.

We, the jury, find the defendant guilty in all four counts this 8th day of June, 1920.

FRANK H. REYNOLDS,
Foreman.

Judgment.

Whereupon, it is considered, ordered, and adjudged by the Court, that the said defendant Oglesby Grocery Company pay a fine of Two Thousand ($2,000.00) dollars.

In open Court, this 8th day of June A. D., 1920.

SAM'L H. SIBLEY,
U. S. Judge.

16 *Petition for Writ of Error.*

To the Honorable Samuel H. Sibley,
Judge of the District Court aforesaid:

Now comes Oglesby Grocery Company by attorney and respectfully shows that on the 8th day of June A. D., 1920, a jury duly impaneled found a verdict of guilty against your petitioner, and upon such verdict a final judgment was entered on said 8th day of June A. D., 1920 against your petitioner, adjudging it guilty, and assessing a fine against it in the sum of Two Thousand Dollars ($2,000.00). Said proceedings was had on an indictment against Oglesby Grocery Company, Petitioner herein, which indictment was baised upon Section 4 of an Act to provide further for the national security and defense by encouraging the production, conserving the supply,

and controlling the distribution of food products and fuel, approved August 10, 1917, as amended by the Food Control and the District of Columbia Rents Act, approved October 22, 1919, your petitioner by demurrer, a motion to direct a verdict, by objections to testimony, by requests to charge, and by objections to charges given, having contended that said Act as amended was unconstitutional and void, and in violative of the Constitution of the United States and this being a case in which the constitutionality of a law of the United States is drawn in question.

Your petitioner, feeling itself aggreived by said verdict and judgment, entered thereon as aforesaid, herewith petitions the Court for an order allowing it to prosecute a Writ of Error to the Supreme Court of the United States under the laws of the United States in such cases made and provided.

Wherefore, premises considered, your petitioner prays that a Writ of Error do issue that an appeal in this behalf to the Supreme Court of the United States sitting at Washington, District of Columbia, for the correction of the errors complained of and herewith assigned, be allowed and that an order be made fixing the amount of security to be given by plaintiff in error conditioned as the law directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of said Writ of Error by the Supreme Court of the United States.

17

EDGAR WATKINS,
Attorney for Petitioner in Error,
Fourth National Bank Bldg., Atlanta, Ga.

Order Granting Writ of Error.

Let the Writ of Error above prayed for issue upon the execution of a bond by Oglesby Grocery Company, a Corporation, payable to the United States in the sum of $4,000.00, such bond, when approved, to act as a supersedeas.

This June 30, 1920.

SAM'L H. SIBLEY,
Judge United States District Court,
Northern District of Georgia.

Filed in Clerk's Office June 30, 1920. O. C. Fuller, Clerk, by C. A. McGrew, Deputy Clerk.

18 *Assignment of Errors.*

Now comes Oglesby Grocery Company, defendant below, plaintiff in error here, and in connection with its petition for Writ of Error in this cause assigns the following errors which plaintiff in error avers occurred on the trial thereof and upon which it relies to reverse the judgment entered herein, as appears of record.

1.

Because the Court erred in admitting the testimony for that during the trial of said case, Counsel of the United States asked John A. Manget, a witness for the Government who had already testified that he was Chairman of the Fair Price Committee for Georgia, to explain to the Jury just what the plan of action of said Committee was in fixing prices and what efforts were made by the Committee to carry out such a plan.

Counsel for the defendant in the Court below, plaintiff in error here, then and there objected to said question on the grounds that the same was immaterial and irrelevant, that no action of the Fair Price Committee was relevant or binding on the defendant, that said Fair Price Committee had no legal function to perform in relation to the issues of the case on trial and that the bill of indictment did not charge a violation of the price fixed by the Fair Price Committee.

Said objection was overruled by the Court, and the witness permitted to answer and to testify that the Fair Price Committee, after giving public notice through the newspapers, determined that it was a fair profit, prior to April 20, 1920, for Wholesale Grocers to receive in selling sugar 1c. per pound in excess of the invoice cost and freight on the sugar; that on April 20th said Committee increased said margin of profit to 1½c. per pound, and that thereafter,
19 about May 1, 1920, under direction from the Attorney General of the United States, said profit was decreased to 1c. per pound.

To the ruling of the Court in permitting said testimony, defendant in the Court below, plaintiff in error here, then and there excepted and said exception was noted and allowed and said testimony received.

2.

The Court erred in admitting testimony for that during the trial of said case Counsel for the United States asked Miss Emma T. Martin, Secretary of the Fair Price Committee, a witness for the Government, to read in evidence from her notes of what occurred with reference to fixing a price on sugar sold by Wholesale Grocers.

Counsel for the defendant in the Court below, plaintiff in error here, then and there objected to said question and urged the objection that the best evidence was the minutes themselves; that the notes taken therefrom were secondary evidence; and that such testimony was incompetent, immaterial and irrelevant, because the Fair Price Committee had no authority to fix a price binding on the defendant.

Said objection was overruled by the Court, and the witness permitted to testify that the Fair Price Committee has a sub-committee on sugar, composed of a sugar broker, a retail grocer, and a wholesale grocer, which sub-committee recommended to the Fair Price Committee the price at which sugar could be sold by Wholesale

Grocers; that said Fair Price Committee on such recommendation in October, 1919, fixed a profit of 1c. per pound for Wholesale Grocers over the invoice cost and freight; that such profit remained until April 20, 1920, when the profit was fixed at 1½c. per pound, which remained the profit until about May 1, 1920, when under order from the Department of Justice, the profit was reduced to 1c. per pound.

To this ruling of the Court, permitting the testimony of
20 Miss Martin, defendant in the Court below, plaintiff in error here, then and there excepted and said exception was noted and allowed.

3.

During the trial of said case, the Government offered in evidence the written appointment of John A. Manget, a witness for the Government, as a Fair Price Commissioner for Georgia.

Without questioning the execution of the paper constituting the appointment, Counsel for defendant, Oglesby Grocery Company, then and there objected to the introduction of the certificate of appointment, because same was immaterial and irrelevant, and because the Fair Price Committee, of which said Manget was Chairman, had no function under the provisions of the law under which the indictment in this case was found, the functions of said Committee being limited to Section 5, of the Act of Congress of Aug. 10, 1917.

Said objection was overruled by the Court, and the certificate of appointment introduced and read to the Jury.

To this ruling, Counsel for defendant, Oglesby Grocery Company, plaintiff in error here, then and there excepted and said exception was noted and allowed.

4.

Because the Court erred in not charging the Jury, a written request therefor having been properly presented, as follows:

"Neither the so-called profit of 1c. per pound, nor the profit of 1½c. per pound, claimed by the Fair Price Committee to have been fixed as reasonable in the sale of sugar, is valid, there having been no notice to defendant, defendant not having been heard when said charge, or charges were fixed, and the Committee not having considered all the elements of the cost."

21 5.

Because the Court erred in not charging the Jury a written request therefor having been properly presented, as follows:

"You are further charged that because in fixing such charge no consideration was given to value, the charge fixed by the Committee is void."

6.

Because the Court erred in charging the Jury, exception being properly taken, as follows:

"The Government says that a just and reasonable rate had been fixed by the President through the agency of the Attorney General, and also through the agency of the Fair Price Commission at Atlanta. Evidence has been introduced as to what those agencies of the President had determined to be a fair and just rate in handling sugar at wholesale. That evidence has been admitted before you for what you think it is worth. It is not conclusive; it is not a judgment; the Oglesby Grocery Company was never called before either one to have a hearing about so that a trial could be had to fix the thing. It is admitted only as prima facie evidence as to what the Attorney General and the Fair Price Commission decided was just and reasonable."

7.

Because the Court erred in charging the Jury, exception being properly taken, as follows:

"This Section 5 of the Act authorizes the President, through such agencies, to determine what is a just and reasonable profit, the language is not 'a just and reasonable rate,' and it is a little different. Just and reasonable profit,—the word 'profit' might have a good many significations in the minds of different people. One man might say that profit is the difference between what a commodity cost and what it is sold for. That is what I have told you that the rate and charge was. Another man might think that ought
22 not to be considered profit but that profit is only what a man gets clear, after paying all his expenses of every sort in connection with it. Here it becomes important, therefore, in considering the finding, both of the Attorney General and the Fair Price Committee, to know what they thought profit was, and in looking at all the circumstances they dealt with; you have to know that in order to tell how much the compensation ought to be and what they found."

8.

During the trial of said case, Counsel for the defendant, Oglesby Grocery Company, offered in evidence a stipulation between the Attorney for the United States in this case and defendant, that F. M. Spencer, Special Agent in charge representing the Department of Justice on Aug. 28, 1919, mailed out to wholesale grocers in the State of Texas a letter, signed by himself, asking grocers to report, among other things the cost of their commodities, and telling grocers that the cost price expected to be used was the market or replacement value as of the date such report was to be made.

Counsel for the Government objected to the introduction of said letter and statement and urged that the same was immaterial and irrelevant.

Which objection was sustained by the Court, and the Court refused to permit the introduction of said stipulation, letter and statement.

To this ruling, Counsel for the defendant, Oglesby Grocery Com-

pany, plaintiff in error here, then and there excepted, and said exception was noted and allowed.

9.

Because the Court erred in not charging the Jury, a written request therefor having been properly presented, as follows:

"The Court directs you that in determining what is a just and reasonable charge to be made in handling and dealing in sugar that you must take the value of the sugar at the time the sale was made
23 by the defendant, and if you find that the value of such sugar had increased since it was acquired by defendant, defendant is entitled to the benefit of such increase. If therefore, you believe from the evidence that the sugar alleged to have been sold in this case was, at the time it was sold, of a market value in excess of that alleged in the indictment or if the Government has failed to prove such value, you will find the defendant not guilty."

10.

Because the Court erred in not charging the Jury, a written request therefor having been properly presented, as follows:

"Value means what the sugar was worth in the market on the day of the sale. In determining what such value was, you will consider offers to sell or buy and market quotations and from all the facts determine what was the present value of sugar on April 13, 1920, and the cost to defendant is not a standard of value."

11.

Beacuse the Court erred in not charging the Jury, a written request therefor having been properly presented, as follows:

"In determining whether or not the defendant sold sugar at an unreasonable rate or charge, you will determine from the evidence first the market value of the sugar at the time it was sold. The fact, if you believe it to be a fact, that the sugar increased in value over what it was bought for, must be considered by you, as you cannot base your verdict solely on the freight charges and amount paid for the sugar."

12.

Because the Court erred in not defining cost and in not giving the request to charge seasonably made in writing, as follows:

"Cost, as used in the indictment, and as used throughout this charge means the price paid, or contracted to be paid when the sugar was bought, plus the freight paid to transport said sugar from
24 the place where it was bought to Atlanta, Ga., plus interest on the investment in the sugar, calculated from the time the sugar was paid for until the sale thereof was made; plus the reason-

able and necessary charges in removing and delivering the sugar from the car in which it was shipped to the warehouse of Oglesby Grocery Company; plus the cost of delivering the sugar from the warehouse of Oglesby Grocery Company to the retail merchant to whom it was sold, plus any other charge attributable to the particular purchase of sugar prior to its reaching the warehouse of Oglesby Grocery Company."

13.

Because the Court erred in not charging the Jury, a written request therefor having been properly presented, as follows:

"It is not sufficient evidence of the cost of the sugar for the Government to establish the price paid therefor by Oglesby Grocery Company to the Savannah Sugar Refining Company and the freight paid for transporting said sugar from Savannah to Atlanta."

14.

Because the Court erred in not charging the Jury, a written request therefor having been properly presented, as follows:

"'Wilfully,' as used in the indictment, implies on the part of the defendant, a knowledge of the facts, and a purpose to do wrong. It means a voluntary act with a bad purpose, and without ground for believing the Act to be lawful. Before you can convict the defendant, you must believe from the evidence beyond a reasonable doubt that the defendant knowingly without ground for believing the act to be lawful, with a bad purpose and with a purpose to do wrong, made a sale, or sales, of sugar, as alleged in the indictment."

15.

Because the Court erred in not charging the Jury, a written request having been properly presented, as follows:

"If you believe that defendant's officers who sold the sugar described in the indictment acted in good faith and believed that it had a right to sell sugar at the price it was sold, you will find the
25 defendant not guilty."

16.

Because the Court erred in not charging the Jury, a written request therefor having been properly presented, as follows:

"If the evidence fails to convince you beyond a reasonable doubt that defendant acted wilfully, as 'wilfully' has been defined to you, you will find the defendant not guilty."

17.

Because the Court erred in charging the Jury, exception being properly taken, as follows:

"The word 'wilful' was read to you from the statute. There has been some discussion about that. Wilful means a deliberate purpose to do the thing that was done. It means that there wasn't any mistake about it or any accident that got a man into something he did not intend. It does not mean in this connection that the defendant knew or believed that what he did was just and reasonable. If as a point of fact the charge made was unjust and unreasonable, and unjust and unreasonable beyond a reasonable doubt in your opinion, and they deliberately made that charge wilfully, then there would be a wilful exaction of an unjust and unreasonable charge within the meaning of this statute. I call your attention to that meaning of the word 'wilful,' because there has been some discussion about it. Whether or not there was any accident or misfortune or misunderstanding that might render the making of an unjust and unreasonable charge not wilful under the circumstances in this case, it is for you to say, or whether the defendant did make wilfully an unjust and unreasonable rate or charge, as set out in the charge. If so, they are liable to be convicted under this indictment, and if not they are not liable to be convicted, of course."

26

18.

Because the Court erred in excluding testimony for that during the trial of said case, counsel for defendant, Oglesby Grocery Company, in cross-examining J. E. Raley, a witness for the Government, asked said witness if the price of salmon in Atlanta had fallen during the year 1920.

Counsel for the United States objected to said question and urged that the same was immaterial and irrelevant.

Said objection was then and there sustained by the Court, who refused to permit the witness to answer the question.

Counsel for defendant, Oglesby Grocery Company, stated that he expected to prove by the witness that the price of salmon had gone down in Atlanta since January 1, 1920, that wholesale grocers in Atlanta had been compelled to sell salmon at less than cost, and had thereby lost money.

To the ruling of the Court in refusing to permit the witness to testify as stated, counsel for defendant, Oglesby Grocery Company, plaintiff in error here, excepted, and said exception was noted and allowed.

19.

During the trial of said case, counsel for the defendant, Oglesby Grocery Company, offered to prove by E. M. Hudson, A. W. Walker, R. W. Davis, H. Y. McCord, H. L. Singer, Chas. I. Brannan, Jos. A. McCord, Frank Hawkins and D. C. McClatchey, that Wholesale Grocers in Atlanta had during the months of March, April and May, 1920, lost money on canned fish, cheese, lard, lard compounds, and on other commodities, because the price of said commodities had gone down after the purchase by Wholesale Grocers.

Counsel for the United States then and there objected to said ques-

tion as to each of said witnesses, because the same was im-
27 material and irrelevant.

Counsel for Defendant, Oglesby Grocery Company, stated that he expected to prove by each of said named witnesses that during the months of March, April and May 1920, the prices of the named commodities had gone down; that grocers had to go down with the market, selling at less than cost, and had, therefore, lost money.

The Court ruled that the objection was good and declined to permit the introduction of the testimony.

To this ruling Counsel for defendant, Oglesby Grocery Company, plaintiff in error here, then and there excepted and said exception was noted and allowed.

20.

Because the Court erred in not granting the motion to direct a verdict for the defendant below, plaintiff in error here, on the ground of the written motion seasonably filed, asking such direction, because there was no legal testimony showing the commission of any crime.

21.

Said Court erred in not sustaining the demurrer to the indictment filed by Oglesby Grocery Company, plaintiff in error, the law on which said indictment is based being void, because in conflict with the Constitution of the United States.

22.

Said Court erred in not directing a verdict for defendant, a motion in writing having been made, prior to the argument before the Jury and prior to the submission of the case to the Jury, asking that such direction be given because Section 4 of the Act of August 10, 1917, as amended by the Act of October 22, 1919, the statute under
28 which the indictment in this case was found and prosecuted, is unconstitutional and void and in conflict with the Constitution of the United States.

23.

The Court erred in not directing a verdict for the defendant below, plaintiff in error here, a written request having been seasonably made and in submitting the issue to a jury; because the law under which the prosecution was had, violates the Constitution of the United States in the following particulars, to-wit:

(a) Conditions existing on April 13, 1920, did not justify the employment of the war powers of the Constitution.

(b) The Act is an unconstitutional attempt to delegate the legislative powers of Congress.

(c) The Government in the indictment and on hearing relies on a price fixed by an alleged Government agency, and as no hearing was had, fixed said price, and the law and facts were disregarded in fixing such price, the defendant is denied due process of law, and the equal protection of the law.

(d) Said law is in violation of Paragraph 1 of Section 2, of Article 4 of the Constitution of the United States, in that it denies to citizens of one State privileges and immunities granted to citizens of other States.

(e) Said statute is void, in violation of Paragraph 1, of Section 2, of Article 4, of Constitution of the United States for that the statute, as administered, denies the equal protection of the laws, and is not uniform in its application throughout the several States of the Union.

(f) The statute under which this indictment is found is void in violation of the due process clause of the Fifth Amendment to the Constitution in that it does not operate on all alike, and is so
29 wanting in a basis for classification as to produce such a gross and patent inequality as inevitably leads to a denial of due process to the defendant below, plaintiff in error here.

(g) Said statute is void, because the violation of Article 5 of the Amendments to the Constitution of the United States and deprives defendant below, plaintiff in error here, of its property without due process of law, and takes its property for public use without any and without just compensation.

(h) Said statute deprives persons of property and takes property without just compensation, for that the value of such property is not considered, and only the cost thereof is taken as a measure of value, and thus violates Article 5 of the Amendments to the Constitution of the United States.

(i) Said statute is void and in violation of Article 5 of the Amendments to the Constitution, in that it seeks to take a citizen's liberty and property without due process of law and indictments thereunder are void in charging an offense without adequately defining the offense.

(j) Said statute and the indictment drawn thereunder violate the Sixth Amendment to the Constitution of the United States for that neither informs defendant "of the nature and cause of the accusation."

(k) Said statute is unconstitutional and void, because a judicial determination of what is a reasonable price is "beset by such deterrents," as to deprive defendant of its constitutional rights to due and equal process of law.

30 Wherefore, plaintiff in error prays that the judgment of said Court be reversed.

EDGAR WATKINS,
Attorney for Oglesby Grocery Company,
Fourth Nat'l Bank Building, Atlanta, Ga.

Filed in Clerk's Office June 30, 1920. O. C. Fuller, Clerk, by C. A. McGrew, Deputy-clerk.

31 *Supersedeas Bond.*

Know all men by these presents that we, Oglesby Grocery Company, a Corporation of the State of Georgia as principal, and J. E. Raley, as surety, are held and firmly bound unto the United States of America, its successors and assigns in the full and just sum of $4,000.00, for the payment of which well and truly to be made we hereby jointly and severally bind ourselves and our respective successors firmly by these presents.

Whereas lately at a hearing before the United States District Court for the Northern District of Georgia in a prosecution depending in said Court in which the United States was prosecutor and Oglesby Grocery Company defendant, a final judgment was rendered convicting the defendant and ajudicating that the defendant should pay the United States the sum of Two Thousand Dollars, ($2,000.00), and Oglesby Grocery Company seeks to prosecute its Writ of Error to the Supreme Court of the United States to reverse said final judgment.

Now, therefore, the condition of this obligation is such that if the said Oglesby Grocery Company, as Plaintiff in Error, shall prosecute its said Writ of Error to effect and answer all costs and damages that shall be adjudged against it if it shall fail to make good its plea then this obligation shall be void; otherwise to remain in full force and effect.

In witness whereof the Oglesby Grocery Company, as principal and J. E. Raley, as surety, have hereunto set their hands and seals—this 30 day of June in the year of our Lord Nineteen Hundred and Twenty.

32 OGLESBY GROCERY COMPANY.
W. A. ALBRIGHT, *Prest.* [SEAL.]
J. E. RALEY. [SEAL.]

Order Approving Bond and Supersedeas.

The foregoing bond is hereby approved and it is ordered that the same operate as a supersedeas.

SAML. H. SIBLEY,
Judge United States District Court for the Northern District of Georgia.

Filed in Clerk's Office June 30th, 1920. O. C. Fuller, Clerk. By C. A. McGrew, Deputy-clerk.

33 *Bill of Exceptions.*

Be it remembered that on the trial of this case wherein the United States was Plaintiff and Oglesby Grocery Company, a corporation, was Defendant, in this Court, that an indictment was returned into open Court against defendant on the 27th day of April, 1920.

Thereafter defendant interposed its demurrer to said indictment, and, after argument, to-wit, on the 6th day of May, 1920, at the term in which said indictment was found, came on to be heard said demurrer, which demurrer was then and there overruled, to which ruling and judgment this defendant, Oglesby Grocery Company, then and there excepted, which exception was then and there allowed, and is here and now sealed.

Thereafter at the same, the March Term, 1920, of said Court, to-wit, on the 3rd day of June, A. D., 1920, Honorable Samuel H. Sibley, Judge presiding, the following proceedings were had:

The defendant, having been duly arraigned, pleaded not guilty, and a jury was impaneled and sworn, according to law, and thereupon the United States, to sustain the issue on its part, introduced certain testimony.

At the close of the testimony presented by the United States, the defendant to sustain the issue upon its part, introduced certain testimony, and thereupon in rebuttal, the plaintiff introduced certain other testimony.

The evidence and all the evidence affecting the matters to which this Bill of Exceptions relates was as follows, to-wit:

JOHN A. MANGET, a witness called on behalf of the prosecution, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Alexander:

I am Fair Price Commissioner for Georgia, appointed by the Attorney General of the United States, on the 21st day of December, 1919. I had been acting as Fair Price Commissioner prior to that time, under the same authority, but it did not come to me as directly as this one did. There was no question that arose about my authority that I ever heard of.

Mr. Alexander: As a Committee, both before this appointment and after this appointment, explain to the jury just what the
34 plan of action was, and what the efforts were that you undertook to carry out.

Thereupon Counsel for Defendant, urged objections as follows: Mr. Watkins: If your Honor please, as I conceive the law to be it is utterly immaterial whether or not there was a Fair Price Committee, immaterial how they were organized or how appointed or by

whom and what they did. I object to any action of the Fair Price Committee being presented at this time in this case. I am objecting both to the method and to the fact of price fixing by a committee. I do not believe the Fair Price Committee has any legal function to perform.

The Court: The Statute seems to give the witness an official position which qualifies him to reach a conclusion and that evidently ought to make his conclusions evidence,—not conclusive evidence but as evidence in this case.

Mr. Watkins: In addition to that point, if Your Honor please, we ought to have been charged with violating the prices fixed by the Fair Price Committee, if that is expected to be used against us.

The Court: I don't think you could be. The Fair Price Commission could not make a crime, but they might make some evidence that would illustrate their story of a criminal case, but not make a crime. No order made without a full hearing should be conclusive, but I think it was within the power of the legislature to make it evidence although without any formal hearing, and I think in this case we have a situation in which there is a proceeding brought in this court and in which the orders of the President, made through this Board, would be evidence. I think they are admissible. What effect the jury will give them in their decision of the case is a matter to be dealt with later.

The Court after argument, ruled as stated above and permitted the witness to answer and to testify as to the price fixed by the Fair Price Committee and the methods adopted by such Committee.

The Witness: When the Fair Price Committee met for the purpose of passing upon and determining what was a fair price, interested parties were invited to all our meetings. They were all equally invited and we passed on it—usually a certain board,—
35 we had one wholesale grocer there and we had one broker who handles sugar from the refineries to the wholesalers, we had two boards, we had the retailers' board and the wholesalers', all the members of the committee; we each considered all the views that were given. We had representatives of practically every line of business, the leading lines of business I will say that handle the necessities of life, invitation being extended. My committee first began to function about August, 1919, and at that time the price allowed on sugar to be charged by the wholesaler was 75 cents per 100 pounds.

Whereupon Counsel for the defendant did then and there further object to the ruling of the Court, permitting the witness Manget to answer either as to the method of fixing prices on sugar or to the fact and amount of the charge fixed on the grounds stated above and objected to any further testimony as to such charge so fixed and prayed an exception thereto, which exception was then and there allowed and sealed accordingly.

The Witness: Within ninety days from the time I was appointed chairman, between August and November, I would say, the price was increased to $1.00 per 100 pounds. I could not swear that I

knew wholesale grocers were complying with the $1.00 per 100 pounds profit, but it was my business to find out if they were not complying with it and I had no complaints. On April 20, 1920, the margin over cost was increased to $1.50 per 100 pounds, allowing the wholesaler a cent and a half a pound profit over his cost plus the freight. After paying the cost and freight this was allowed over that to cover his cost of business, his expenses, whatever they were, and his profit included no general expenses, that should be covered by his gross profit and including no expense of cartage and matters of that sort. From the time the railroads brought the goods here, all other expenses were classed as general or overhead expenses and were to be taken care of out of the profits of
36 one cent. As to that profit, that cent and a half, that margin that was allowed. I got a call-down from the Government for advancing it to a cent and a half and was told to put it back to where it had been and I did so, about the middle of May. When on April 13, 1920, the sales charged in the indictment were made the profit fixed was one cent a pound. The considerations that entered into my mind and that of the committee in their transaction of advancing the margin from one cent to a cent and a half, was the fact that there was a sugar shortage and the merchants were having to pay much more for sugar than they had originally paid for it. And further because the wholesalers threatened to quit handling sugar if they didn't get a larger profit.

When I learned that there was some complaint about the prices charged by the Oglesby Grocery Company, I took the subject up with Mr. Albright on the telephone. I told him that he had been reported to me as charging twenty cents a pound for granulated sugar and asked him if it was correct. He told me yes. I asked him didn't he know that was a violation of the rules of the Fair Price Committee, and he said Yes. Then I don't know that I can quote the exact words, but I asked him to the effect if he proposed to defy the rules of the committee and sell it at what he pleased, and he said—yes, he was tired selling sugar at cost. Mr. Albright is President of the Oglesby Grocery Company. I asked him if it wasn't part of the sugar shipped in here by the Savannah Sugar Refinery on sixteen cents cost. He said that was what it cost him at the refinery and the freight to Atlanta, approximately a quarter of a cent.

I could not swear to the freight, I know it is right around twenty-five cents, it may be a cent or a fraction of a cent, or a cent and a fraction above that, for I haven't paid freight on any in some little time. I have been dealing intimately with sugar for thirty-six years myself, every year for 36 years until five years ago and have been in the grocery business wholesale and retail, for the larger part of
35 years—36 years.

37 I was put in bankruptcy in the early part of 1915. I was up to that time familiar with the course of trade and prices on sugar. Along prior to the outbreak of the European War, which occurred in the summer of 1914, I knew approximately what the retail price of sugar was. It rarely got above seven cents, or seven

and a fraction. I can't swear as to the markets at any specific time, any specific year or season, but I can swear that the price to the consumer from retailer, over a number of years, was somewhere between five and eight cents, maybe nine cents at times. I have sold it 20 pounds for a dollar many a time. That was back in the 90's sometime and at retail. You asked me the usual and customary profit of a jobber on sugar. The jobber handled sugar largely as the retailer did, largely as a matter of advertisement and accom-oda-tion to his customers. I can swear that it has not been the custom for a jobber or retailer ever to make anything that would be called a fair percentage of profit on sugar. The usual and customary profit in this market to a wholesaler selling sugar is dependent largely on the credit rating and the credit responsibility of, or the prompt pay-ing of the bills by the retailer what percentage of profit the jobber received. If it was on a cash sale from 35 cents a barrel of 350 pounds average, to one dollar a barrel. The man who paid a dollar a barrel profit was not as careful on his buying, he wasn't as good buyer as the man who could buy at thirty-five cents a barrel.

The margin of fluctuation for the wholesaler's profit ran from 35 cents to a dollar a barrel, but I don't want the jury to understand me to swear that no jobber ever charged higher profit than a dollar a barrel. I don't want to convey that impression. I would say that from 35 cents to a dollar dependent on the ability of the customer to buy on a close margin of profit to the wholesaler, as to whether it was nearer the lower price or nearer the higher price. And that time the invoiced price of sugar running to the wholesaler, I would say over a period of years ran from four and a half, probably
38 to six and a half cents per pound.

When I took charge of the Fair Price Committee last summer or fall the wholesaler was paying something between eight cents—between eight and nine cents a pound, subject to a two per cent discount for cash. At that time they were taking a profit of sixty-five cents a 100 pounds, that is they were allowed that. I don't say they took it, they were allowed that—that was the maximum. We had a sugar shortage in the fall of last year. We had a maximum price to the consumer of 12 cents for Standard granulated sugar. It didn't matter where it came from, Cuba or Louisiana. The first heavy advance began to crop out in sugar in the fall, I will say now within 90 days, within three or four months after that. The Government is still to a certain extent controlling sugar that was bought by refineries and brought in here from Cuba, it is controlling it in this sense that the Government knows what these refiners paid for their raws in Cuba and the Government also knows that all those refineries they could just as well or better get as much for their sugar today than the Louisiana farmers are getting for theirs, but they are still selling it at 10 cents a pound, approximately, less than Louisiana is selling inferior sugar for. That heavy advance applied to Louisiana sugar; they have a gran-ulated and a clarified sugar. There are some refineries in Louisiana that turn out sugar, whether grown in Louisiana or Cuba, that is just as pretty as the refineries in New York or Savannah or any-

where else. There is some sugar known to the trade as Louisiana granulated which is inferior to standard granulated, but there is other sugar produced in Louisiana that is just as white and pretty as sugar purchased anywhere.

At the time the Oglesby Grocery Company bought this carload of sugar that complaint is brought about there was a sugar shortage, there is a difficulty about sugar now, sugar is still very scarce, very hard to get and very high. The price that is being asked for sugar now: I have seen an invoice in the last sixty days where sugar was billed to a jobber which with the freight added would figure twenty-eight and a half cents, approximately. That sugar came from Louisiana.

39 Cross-examination.

By Mr. Watkins:

In November, about November, when I fixed that one cent a pound margin, I determined that that was a proper margin from the fact that the committee did not feel that at the percentage of profit then allowed the jobbers under the sixty-five cents or seventy-five cents was fair. I could only speak individually. There were twenty or twenty-five members of the committee, and I could not answer for them. My own conclusion was they ought to have more money for handling sugar than sixty-five cents on the hundred pounds, and one cent was fixed, from the view of the commission as to the facts and from the margin of profit. The committee, or commission, acted by somebody making a motion to make it one cent and the majority voted for the one cent, that is usually the procedure. Minutes of our proceedings were kept. I did not keep them. The Secretary, Mrs. Martin, keeps them. I don't know how many were present at the meeting, nor who voted for that rate, nor do I know whether any other rate than the one cent was proposed. I did not vote unless it was a tie, and I don't recall that it was a tie.

I did not participate except as the presiding officer. I do not remember who was present. Mr. W. A. Albright was not there. I don't recall having seen him. He wasn't a member of the committee, but he might have been out in the audience. I never wrote or telephoned him to be there, he had as much right to be there as anyone had. I didn't invite him any more than the other twenty. The other twenty men handled sugar, approximately twenty others handle it in this section, and they were all invited to attend the meetings of the Fair Price Committee, through the press. The public generally is invited to attend the meetings of the Fulton County Fair Price Committee, that was the language of the invitation as near as I can recall. I have extended it a good many times and I might have changed it a little. That was the substantial language of it. I usually said sugar was coming up or coal was coming up, or dry goods or clothing. I could, probably, in this book find the specific invitation (producing a book), you could probably find it there, there are a good many newspaper clippings in this book.

40 I did not issue any particular invitation, but I am sure I invited the public to all meetings of the Fulton County Fair Price Committee. I do not recall any notice of the meeting given at which I raised the price to one and a half cents. I do not know whether or not there was any specific invitation to attend a meeting at which the price of sugar would be considered at the time I raised to one and a half cents. I will state that it was customary to give at the previous meeting what was coming up at the next meeting and also it was customary to announce at one meeting at which there were representatives of all lines of trade and business, that we would take up a certain matter for discussion at the next meeting. I did not always state exactly when the next meeting would be called, but we notified the members by telephone and through the press in advance of the sitting of the commission.

I will endeavor to find the notice of that meeting at which the price was raised to one and a half cents, now or later. There are quotations daily in certain New York commercial journals on raw sugar and on refined sugars too, I think that is customary. I am familiar with the New York Journal of Commerce, as a standard commercial paper. I am paying two cents more per pound for cotton than it is quoted in the papers now. I look at the quotations, more as a matter of amusement than to convince myself as to what the price is. I am not swearing that it is true of the sugar proposition, but in a general way, you can't rely on newspaper quotations. I do not know what the quotation in New York was on April 12th and 13th, I could not say, but I know that sugar from Louisiana had already gone up pretty high. I have a telegram from the Americus Grocery Company stating that he was offered sugar at 25¾ about April 12th or 14th. That was the only offer I know of at that, but I am not swearing that there were not a good many offers of sugar at higher prices. I knew that the New Orleans people and speculators over the country were charging pretty high for sugar, at the same time I know refineries were selling sugar on the basis of their old contracts of 16 cents, the refiners allocated sugar to Atlanta just in their turn. I don't know that they allocated any at that time. Not that particular day, April 12th, I don't know that they were able to deliver any sugar, April 12th and 13th. They had been pretty well sold up, I think. Of
41 course you ask me a question it is hard to answer, if you ask me the question if you know the price, you ask me if the New Orleans refineries could deliver sugar at 16 cents when I have just sworn that those jobbers were quoting 25¾ cents.

I do not know exactly the date when the Government fixed the wholesale price of sugar in New Orleans at 18 cents for granulated sugar, but I remember there was an agreement between the Attorney General and the planters of Louisiana,—not the refineries but the planters, in November or December, 1919, about the time, and the agreement fixed the price of granulated sugar at 18 cents.

Mr. Alexander: I admit that beginning sometime after the first of November, 1919, perhaps late in November and down for some

time, a good many merchants, to my own knowledge, in this town, bought sugar in Louisiana based on the price of 17 cents for clarified and 18 cents for plantation granulated on the plantation, if that is what he is trying to prove I will admit it to save time.

Mr. Manget: That sugar never got any cheaper, to my knowledge, after that first ar-angement, and it had gone up until about April 12th when it was 25¾ cents.

Mr. Frank Lanier telephoned me and told me he would not buy that sugar unless I gave him permission to sell it at higher than the regular margin. His telegram and telephone conversation was to the effect that he would not *but* it if he could not make a profit on it, and I said "you can make your profit on it just the same if it costs you 25¾ cents or 60 cents or if it cost you 18 cents. I mean to convey the rule that the cost did not figure, no matter how much that was it did not figure on whether one got a profit that was fixed. Mr. Lanier, wanted, I think, to convey the impression to me that he expected to get a larger profit because he was paying a higher price, and I tried to disabuse his mind of that fact right away, that it would not be allowed. I began in the wholesale grocery business in 1903, and continued until 1915, and during that time, I handled sugar, I could not say that sugar did not fluctuate at all because I have sworn that sugar ran from the refiner to the wholesaler from four and a half to six and a half cents,

42 there was no such wide fluctuations as now, those were seasonal changes, when the season opened it was low and toward the end of the season the price would go higher. That was regular, could be foreseen to a large extent. It was more or less the rule that sugar would advance at the end of the season, just before the coming in of another crop. There wasn't any great difference in the margin then, you could determine substantially how sugar would run, it wasn't any great risk at that time, I don't believe it was any risk at all, because if there was a decline the refiner would take care of it and if it advances the wholesaler would get the benefit of it.

At that time the wholesaler did not run any risk at all. I do not consider that he did, unless he had some actually in his stock; then he would lose on it if sugar declined. If I bought sugar at four-eighty, and before that sugar was billed out to me, if it declined to four-seventy, they would give me the benefit of it. The custom if it went up was to give it to us at the old price. It wasn't usual to keep any quantity in the warehouse at that time, because it was always obtainable; that is there was no sugar shortage then. The general custom was when the market advanced on a commodity to try to get a little more for it, that was often done. I would not say it was universally done. Often done. I don't think there is any question about that. In fixing the cost as a basis upon which to figure the sale price, I determined the invoice price cost and added thereto the freight and no other item. I do not consider any other element of cost, not even cartage.

The only definate instructions I ever received from the Department of Justice was to reduce the profit of one and a half cents to

one cent, that is all I can recall right now. I got a circular letter or something from them that the Government would not entertain what they call replacement values. The Attorney General put us here to try at a fair margin of profit for the people and try to put down profiteering and hasn't given us any hard binding rules of procedure in these matters.

The Attorney General never told me that in determining the cost I ought to add interest attributable to the particular purchase when a man buys the goods, nor did the Attorney General tell me to consider or determine the cost of the delivery charge from the car to the warehouse, or to consider that the sugar had
43 to be delivered by the wholesaler to the retailer. I did not consider it in fixing the price, that or anything except as I have previously explained, the invoice plus the freight to the City. That is the basis and sole basis of cost followed. That is all we called "cost." We have fixed profits—on other lines of goods we would allow a man a certain amount of what we would call overhead expense, allow him a certain amount, like women's ready to wear goods, we would not say a skirt would sell for $55.00 but we would say that he could not sell that skirt for more than 40 per cent above his cost, which still, just like sugar, meant invoice cost plus freight. I know that it costs something to haul sugar from the car to the warehouse, I also know that in case of extreme shortage that the cars are placed right on the track of the individual, they don't have to cart it. Talk about bankrupting a man, if he drayed goods to the depot, and other things in proportion, he would have to go into bankruptcy, but all heavy goods are placed on his own side track, as a rule. It is true that cars are usually placed on the warehouse track, and there was no cartage, but it is true that at this particular time, the allocations of sugar are so small that few warehouses get a car load and that they have to distribute it among several different people, when the sugar comes from the refinery. In a case of that kind, where sugar is brought here and distributed among different wholesalers, I don't think consideration ought to be given to that cost, for this reason: When sugar is plentiful and everybody can get it, you must work a little bit to sell it and then wait a little bit for their money sometimes, and there are so many things that offset that little cartage that I did not think it would be fair to add cartage to it. I would not, where there is cartage there is more expense in unloading a car than when the car is placed at the warehouse, just the same as the expense for elevator service, lights, and things of that sort, those are all expenses, just as porters are figured in there, as general expense. I considered all that as part of the operation of the business, as general expense, what we call overhead expense. I do know that all costs of doing business is very much higher now than when I was in business from 1903 to 1915. Labor and every
44 other item of cost has greatly increased. I would say that as to all the different items there are. There are very many of them and I would say I think everything except the cost and freight should be so considered, as overhead expense; there

is no use asking me about each one. I know that sugar is now being bought on irrevokable letters of credit, and there is frequently great delay in the delivery of the sugar and I told the wholesale grocers' board before our committee that so far as I was concerned I regarded the interest as a charge, I made that exception, made it in the open committee meeting; one grocer said that he had sent money up east and it had been there several weeks and would probably be there several more weeks, and I said, so far as I am concerned I would not authorize any prosecution for him adding interest there; they took his money and would not give him the sugar, but we were suffering for sugar and I asked him not to draw his money back but to leave it there. I did make that exception in open meeting to a man, not one of our committee, who appeared before us to tell us about the situation. I have bought and sold cotton; in that business I can't swear as to the uniformity of custom. I might do my business that way and some other man may now and some other man may. Of course I will swear that when there is an advance we try to get it, just like I would have to swear that when it was declining, if we could not get what we asked before the decline, we would have to sell it for less. I had never thought about the cotton business in connection with the sugar business. We sell our cotton to the man who will pay us the most for it. Mr. Albright should not sell his sugar to the man who pays the most for it; the moral difference between the two ways of doing business is because there is no shortage in cotton here, no shortage in cotton, that is one reason. And because cotton has always been handled that way, so far as I have known of it. It is five or six years since I went out of the grocery business into the cotton business. Cotton has always been handled, you sell to the man who will pay you more for the same grade of cotton. The sugar proposition, as I have sworn, has been that a man handled it more as a business getter than anything else. If a man didn't handle anything but sugar, then I would not think there was any difference between selling his sugar, as you say moral difference, and selling his cotton at the best price he can secure, selling for the best price he can get, if he handled only sugar. If he was handling sugar and a lot of other things, and it has been always the custom—you have asked me a good many questions about the custom, it has been the custom to sell sugar at cost, I would not feel right because the sugar, everybody was suffering for it and to put on a very unusually high price,—that is my feeling in the matter. I don't know whether that answers the question or not. The suffering for sugar and no suffering for cotton makes the difference.

Mr. Alexander: I am perfectly willing to admit here that replacement value is the custom in cotton and in nearly everything else.

The Court: The law of supply and demand runs business ordinarily and generally, but in a time of war the statute does.

Mr. Alexander: That is what I am admitting and I say, what is true under all conditions when the law of supply and demand operates, a dealer is justified in charging according to the advanced market. I understand that to be what he is trying to prove. If that is

true there is no use of taking up the time; I admit that to be the fact; I really think from the form of the question that the inquiry tends to make this investigation degenerate from an inquiry of fact into an inquiry into theory and moral principles. That is a mere academic discussion in effect.

Redirect examination.

By Mr. Alexander:

I don't recall any decline in sugar for the last six months. If under the conditions of the market as they now exist, a man were to buy a car load of sugar and the cost to the wholesaler did go down, there would be no effect on the ability of that man, in this market at this time to sell that sugar at the allowed profit, even though the market had gone down, before the new purchases could reach the town, and I will say and I have said that I think the wholesaler who would bring sugar here in these days and supply it to the retailer so he could give it to the suffering consumer was a patriot in the highest sense of the word. If a man buys a car load of sugar today at 25 cents a pound and gets it in and tomorrow the price declines
46 to 15 cents a pound, there would — no practical difficulty in selling that shipment at profit over the 25 cents, before the other sugar ever got here; I think he could sell it out at a profit before the other sugar ever got here.

Mrs. Emma T. Martin, a witness called on behalf of the prosecution, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Alexander:

I am secretary of the Fair Price Committee. We have the minutes giving the information, as Secretary I have copies of the minutes. I have tried to report the spirit of the meetings as well as the actual work done. In order to save the time in going through the minutes I have made a copy here of the action. The minutes were afterwards read to the committee and adopted by them. Those are the minutes of the first meeting of the—not all of them, that is the action taken at a number of meetings. The first meeting, the action taken on sugar of the first meeting, the very first meeting. As I said I wrote up the first minutes but I haven't those because during my absence from the City the complete minutes were lost by the person who acted as secretary of the meetings and I have not gone back,—I have the book of original entry, my notes of every meeting of this Fair Price Committee when I was in the City, and I made this compilation of the facts as recorded until I could have time to go back and rewrite all the minutes,—that was at the beginning of the meetings. As I said, when I was absent from the City the minutes were lost by the Secretary, and I hav-n't rewritten those minutes, but I have the note book. That is the way I kept my minutes, that was

just a compilation of the action of the Committee. The next meeting shows that they were adopted. I called Mr. Manget's attention to that, but he is such a busy man they weren't signed. Here are the minutes of the next meeting which show that the minutes of the previous meeting were adopted, and here is the next that bear on the sugar question, runs from April 12 to May 25th. The papers I hand the District Attorney, although not signed by anybody, are what I wrote as secretary and what was read at a subsequent meeting of the Committee and approved by the Committee. The minutes here begin with the 20th of April; here are many other min-
47 utes. The minutes of that meeting were lost.

The witness then offered to read from her notes of what occurred, to which defendant's counsel objected, that the best evidence of what occurred is the minutes of the meeting, and that a transcript or brief of what occurred cannot be used by the witness. She admits the original notes are in existance.

The Court: I understand it is not a transcript of the minutes but is a memorandum she made a memorandum of her own of what she says occurred. I am allowing her to use the memorandum to refresh her recollection of what happened. It appearing that the minutes adopted as such are lost. You can answer.

To which ruling defendant's counsel did then and there object and pray an exception, which exception was allowed and sealed accordingly and the witness was permitted to testify:

The first meeting composed largely of merchants of the City; committees were formed, the chairman of each committee representing a certain line of business, and at that meeting the question of sugar was taken up by Mr. J. E. Raley; he was chairman of the sugar committee and J. H. Bullock of the grocers' committee, and they selected their own men to work in co-operation with them and to decide what was fair and just margin of profit along the then lines of discussion. J. E. Raley represented sugar; he is the representative of refineries, but I know he was put on the sugar committee because he was considered an expert on sugar, and Mr. Bullock, is a retail grocer and chairman of the sub-committee of retail grocers.

When this committee of which Mr. Raley was chairman acted on sugar, the price of twelve cents from the retailer to the consumer was fixed and ten cents from the wholesaler to the retailer. They allowed the retailer two cents, and to the wholesaler, I don't remember about that; that would be on my note books, but in making the memorandum for Mr. Jackson, he simply asked for the action taken from the retailer to the consumer. I haven't a memorandum on that of what margin was allowed the wholesaler. Mr. Raley was chairman of the sugar committee and Mr. Hudson was present. Mr. Hudson is a groceryman. He is with a wholesale house.
48 McCord-Steward Company. The sub-committee always recommended the price and the committee as a whole or the Fair Price Committee acted on the recommendation after the price was recommended; then it was open for discussion. But no price was fixed except in accordance with the judgment of the men in that line

of business, as to what was fair. Mr. Hudson was present. He was a member of the committee. Mr. Hudson finally agreed, all agreed, it was unanimously adopted that twelve cents from the retailer to the consumer and whatever their price was, was just and fair. I have so many minutes of so many meetings that I am not positive about that. According to my note book of original entry that I looked up those are among the minutes lost. It was October 12th that clarified sugar was sold, the price was fixed at 14 cents, the standard granulated still being twelve cents. Now then on October 20th, because of so many different grades of sugar coming into the market, instead of having a flat rate, a profit of one cent a pound and two cents a pound was adopted. Prior to that time the plan had been to fix the price to the consumer. But at that time the plan of fixing the price of sugar was abandoned and they adopted a plan of fixing a margin of profit of one cent to the wholesaler and two cents to the retailer. The minutes of that meeting are lost, but I know the fact, the one cent margin remained, till April 20th, I think it is. These minutes here correctly show the action taken on the 20th of April in regard to sugar. To all the testimony showing prices or margins fixed by the Fair Price Committee including the testimony of this witness defendant's counsel then and there objected because the same is irrelevant and immaterial and because to make such prices or margins binding to any extent is to deny defendant due process of law and the equal protection of the laws. Which objections were overruled and the testimony received, whereupon said Counsel prayed an exception thereto, which exception is here allowed and sealed accordingly.

The Witness: The sugar question was reopened by the chair, the question being asked of the committee thought it right for the retail merchants to pay $80 for a barrel of sugar and handle it for
49 a profit of $3.50? Mr. J. H. Bullock and Mr. W. T. Akin retail grocer members of the committee said they had not complained before, but it hardly seemed fair for the grocers to be the only men called on to do business at a loss, and that handling sugar on the basis ordered by the Committee meant a loss to the retail man. They stated further that they could sell all their sugar by the barrel at a profit, but instead they had handled it for the benefit of the public. J. H. Bullock moved that the retail merchants be allowed two cents per pound profit and the wholesalers 1½ cents per pound. Seconded by Mrs. Maddox. Carried unanimously.

May 25th, 1920, meeting was opened by the Chair calling attention to the Department of Justice in prohibiting larger profits on sugar than one cent per pound to wholesalers and two cents to retailers." There was nothing left for us to do, except to accept the fact.

Cross-examination.

By Mr. Watkins:

I offer from the minutes that Mr. Akin made the statement that he and Mr. Bullock had attended the meetings since the Government

first began to regulate prices, and that the average of cost had always been allowed.

The Witness: I would like to state that that was not this committee at all, it was one,—the Government had a committee with Mr. Akin and Mr. Bullock.

Redirect examination.

By Mr. Alexander:

This action was taken on Mr. Bullock's motion and he was a retailer, the question was considered by the committee at that time as to the cost which made it necessary to increase the price. Increased cost of doing business to the retailer, there was no suggestion that the wholesaler's cost of doing business had increased. The wholesaler was allowed an increased margin to help him along, I suppose, I don't know. The increased cost to the retailer that made them advance it from two cents to three cents, was as I remember, paper sacks were considered and I remember distinctly one member of the committee saying he was paying a man $25 a week and
50 a large part of his time was consumed in fixing the sugar into two pound packages and one pound packages instead of doing other things.

J. E. RALEY, a witness called on behalf of the prosecution, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Alexander:

I am a member of the firm of J. E. Raley & Brothers, merchandise brokers; we handle a general line of heavy goods and deal in sugar, on a large scale for this territory; we are the biggest sugar brokers in the Atlanta territory; we are not direct representatives of any refineries. We are sub-brokers for Lamborn & Company, who are agents for a number of refineries, New Orleans, Philadelphia, *Philadelphia* and others; international brokers, they are. We collect for this brokerage organization. *The* collect from the seller; we take orders, as brokers, from Walker & Brother or the Oglesby Grocery Company or other wholesalers here and place those orders with Lamborn & Company, and they in turn place them with the refineries. In July of last year, more sugar came from Savannah than any other point, for the reason that the freight rate from Savannah to Atlanta, to this territory, is cheaper than from any other refining point, and therefore it is mostly shipped from that point. The tariff rate is 25 cents on a prepaid basis; most, in fact practically all, standard granulated sugar is sold on a prepaid basis; the refiners pay the freight, and they have to figure on the tare which figures 26.9 cents on barrels and on bags 25.5. That is to say the tariff is 25 cents on the weight of the barrel of sugar and on the actual charge the sugar will figure 26.9 cents. So that the sugar is actually invoiced out to

the dealer, if the price is 16 cents f. o. b. Savannah, it is the prices out at sixteen, twenty-six nine. That applies only on standard granulated sugars, as a rule, because the other grades of sugar are usually sold f. o. b. shipping point. The price of the sugar to the jobber here in the summer of last year, on standard granulated sugar, was, at the refineries, nine cents, because the sugar was produced from Government owned raw sugars. Last summer the price to the wholesaler from the refinery of standard granulated sugar
51 was nine cents on Government sugars, with two per cent off for cash, that is within seven days.

I attended the meetings of the Fair Price Committee after they began to be held here in the city, with more or less regularity; such meetings were not generally attended by dealers in sugar,—I think it was the exception that any of the jobbers attended, that is except those who happened to be on a particular committee for some reason. There was a jobber on the grocers' committee, Mr. Hudson of the McCord-Steward Company. The grocers were complying at the time, 1919, with the margin of profits that was allowed by that committee, but under protest. I expect I received more or a greater number of protests than anybody else, because of my connection with the sub-committee that made recommendations to the general committee. I was on the committee that considered sugar. I do not recall that we made recommendations. There was just a general dissatisfaction among the wholesale grocers and retail merchants, complaining about the necessity of their having to distribute sugar upon the basis that they were called upon to distribute it, and it so developed that when the Louisiana sugar crop came on that it came on to the market unrestricted, and they seem to have gotten pretty nearly what they wanted to down there; we had to go to Louisiana to get sugars; the supply was short and on account of the shortage, we could not get enough standard sugars and Government sugars and we had to go to Louisiana for sugars and pay them pretty nearly what they wanted. Paid higher for it, and in view of the higher price the dealers thought they ought to have a higher margin, and we increased the margin to a dollar a hundred. I don't know the date, but I think it was increased to a dollar and later on to a dollar and a half. That increase and all resulted from the fact that the merchants were dissatisfied with the previous margin allowed. The Fair Price Committee discussed it. These meetings of the committee were hardly ever attended by the dealers, or the public generally. We would see a notice about it in the paper. The price was increased to a dollar and a half a hundred in the spring, because of
52 increases in the price of sugar, the general dissatisfaction on the part of the dealers. They were not satisfied when they raised it to a dollar and a half. They still wanted more. I don't think the wholesale grocers as an organization, or I don't know that they ever suggested any particular margin that they thought they ought to have, but there seemed,—I get this from mixing around with the wholesale grocers and hearing the retail grocers also talking—they were simply dissatisfied with the margins they

were getting, and I don't remember that any of them ever stated what they ought to have. The general range of prices prior to the outbreak of the European War, I never recall sugar being much, if any, below four and a half cents a pound, and then up to seven and a half or eight, to the wholesale dealer. At that time sugar was retailing at, I suppose, on a basis of five cents cost to the wholesaler I should imagine it would retail for may be seven or seven and a half cents. I do not recall when the price to the wholesaler was lower than four and a half cents.

I think sugar was sold prior to the war on different—that the margin of profit varies with different dealers. Some would have reason for selling sugar at lower margins of profit, possibly, than some others, and they would probably sell sugar to one man cheaper than they would to another by reason of the fact that he would consider his credit better or the promptness with which he paid for it and all.

The wholesaler does deliver in the City. All their products are subjected to the expense of cartage because the out-of-town shipments they have to cart it to the depot and in the city the merchants have to cart it all the way out to College Park and East Point, and down to Decatur, and all those suburban points.

Cross-examination.

By Mr. Watkins:

During the period before the war sugar did not fluctuate rapidly, ten points was usually about as much as sugar would change at a time, up or down. And that the fluctuations were usually seasonal, that is when the crop first came in it would be lower, and would go up a little until the new crop came in, so the merchants buying sugar knew practically what he could get sugar for from time to time. My observation was that when prior to the war sugar went off they always followed the market up, because they had to follow it
53 down whether they wanted to or not. They had to observe the declines and my observation has been that safe and sound judgment would dictate to them that it was necessary for them to take their advances. From my experience of eighteen years in the sugar business I would say it is the custom for wholesale merchants to consider the higher price prevailing at the time they sell sugar, and take the replacement value. The Government sugar first sold at nine cents. I think the Government got hold of—the Sugar Board got hold of a certain quantity of Cuban granulated, it was a limited quantity, and I didn't think of that until that minute, but they got hold of a certain quantity of Cuban granulated which they asked the different refineries to distribute for them, for the Sugar Board, and my understanding was that the refineries consented to distribute this sugar for the Government without any profit to itself at all. Now, I don't recall what the price was, but it seems to me it was around thirteen cents or fourteen cents, but I don't recall specifically. The price of Louisiana sugar in November and December,

1919, plantation granulated, was eighteen cents f. o. b. plantation and the freight charged from the location in Louisiana to New Orleans and from New Orleans to Atlanta. That made it worth in Atlanta about eighteen and a half, but usually those sugars were sold on a net cash basis, and were not subject to a two per cent cash discount. You usually had to pay for them before you got them. Some of Louisiana sugar sold higher than 18 cents. I hold in my hand a telegram dated April 12th, 1920, signed Lamborn & Company, sent to J. E. Raley, Atlanta, that offers Guatamala sugar, three thousand bags, similar to Louisiana clarified at twenty-three cents and 1350 barrels similar to Louisiana plantation granulated at twenty-four cents, both net cash f. o. b. New Orleans.

Mr. Alexander: I admit, without taking the time to prove it, I admit that some sugar was actually sold, not only offered but sold here to wholesalers at or about that time, April 12, 1920, in Atlanta, at a higher price than this man is offered. I do not see the use of proving things that were never in dispute. I cheerfully, freely
54 and unhesitatingly admit that there was a scarcity of sugar, and that on the day that these men are indicted for selling sugar for twenty cents, sugar was actually offered and actually sold in Atlanta to wholesalers at higher prices.

The Witness: It was not possible to buy sugar in Atlanta at twenty cents delivered to Atlanta on April 12, 1920; the refineries were not in the market on that day. Practically the refiners for a week prior to that time were withdrawn from the market. All of them were running on more or less capacity; they were allocating their sugars, they were not quoting them but allocating them to their regular markets according to their past purchases and to their representative customers in those markets according to their purchases, and when sugar was allocated to a particular grocer he did not know what it was going to cost him until we told him; told him we had sugar for him this week and he would ask what it was going to cost him. We would not know when they allocated a car from Savannah and would not know what it was going to cost, at least what it was going to cost the wholesaler until we were advised. The wholesaler would not know what it was going to cost him, nor that he could get it, until it was actually allocated. Here is a list of ten refiners of standard granulated sugar in the United States, and on April 16th eight out of those ten were withdrawn from the market, and the only ones quoting at all were B. H. Howell & Co., New York and the Western Sugar Company, New York, and those quotations were only nominal and they did not ship into this territory; whatever they offered was offered to sell higher than twenty cents. Not for prompt delivery. We had some offers for later delivery at seventeen to eighteen cents and later some at twenty-five cents f. o. b. Savannah. Un-er the pre-war condition you could usually figure about eighty-five points between raw sugar and the refined. The Government allowed the refiners under control, at one time, 130 points and they later increased it to 151 points, and since the

55 Government control has been taken off of the refiners my information is that they may run now about three cents. And the duty is added also to the Cuban raw about one cent, but they are working on a spread of about three cents between the net cost of the raw sugar to the, — and the refined, that is what the raw sugar costs them at the refinery.

In cross examining J. E. Raley, a witness for the Government, Counsel for the defendant asked the witness if the price of salmon in Atlanta had decreased during the year 1920, to which question the Government imposed the objection that the evidence sought by the answer was irrelevant and immaterial.

After argument the Court sustained the objection when counsel for the defendant stated that he expected to prove by the witness that the price of salmon had gone down in Atlanta since January 1, 1920, that wholesale grocers in Atlanta had been compelled to sell salmon at less than cost and had thereby lost money.

Whereupon Counsel for defendant did then and there object to said ruling and prayed an exception thereto, which exception is here now allowed and sealed accordingly.

The Witness: At one time sugar went down, I remember very distinctly the Savannah price opened up—what I mean is after they had gotten rid of the Government control sugar, which sold at nine cents and then were turned loose by the Sugar Board and got in business for themselves, they went and bought sugars, and when they got into the new crop, sugars at the Savannah refinery opened up at 16 cents, the first price they made, and the American opened up at fifteen and a half, and I know they reduced twice, and I think three times, and it got down as low as fourteen cents, I believe, fourteen and a half certainly. After that the market started back up again.

56 Redirect examination.

By Mr. Alexander:

I sold this lot of sugar complained about to the Oglesby Grocery Company for 16 cents. Shortly after that time the price advanced, on May 1st. This sugar was sold, I think it was April—I delivered 144 barrels of sugar to the Oglesby Grocery Company on April 13th. On April 6th we delivered them a car at the same price. The American refinery put its opening price after Government control, at 15½. They have refineries in the east and in New Orleans. New Orleans supplies this territory. Then the American refinery put its price down, rapidly, to as low as 14 cents. At that time sugar was not scarce. We didn't have any indications at that time of a shortage, it was throught, as a matter of fact, that sugar would be cheaper. Wholesale grocers here bought some sugar. That decline did affect the Savannah refinery, which principally supplies this market. Some manufacturers got some; I know some of the wholesale grocers got some of it, but very little of it. That

fact did not force anybody else to sell sugar at less, it could affect sugar here, at that time we were not exceedingly plentiful, still there wasn't an acute shortage, but the wholesale grocers were able to dispose of what they could get. At that time that this 16 cent sugar was sold to the Oglesby Grocery Company, thousands of barrels were already sold here in this market for future delivery, some of which has not been delivered yet. There is no 16 cent sugar yet to come. There were none of the 16 cent sugars sold for future delivery. The lowest price sugars sold of which we have any note was 17 cents, then up to as high as 25½ cents.

Beginning at a period before Oglesby bought this and continuing on up till the present time the Savannah sugars were and are being allocated, at prices of 16 cents up until the first of May and then seventeen and a half. Most future sugars have been sold on irrevokable letters of credit to everybody they were offered; I didn't sell any of them.

It is a fact that certain speculators claiming to have supplies of sugar somewhere or the possibility of getting them, have offered to sell sugars here and all over the country at a particular price,
for future delivery, provided the purchaser will give them
57 irrevokable letters of credit for the amount. That is a preposterous demand. Grocers have not in this market bought sugar on irrevokable letters of credit but they have in other markets. It has not had any effect here.

Atlanta, Ga., June 7th, 1920.

Pursuant to adjournment, the trial proceeded at 10 o'clock A. M.

Present: The same counsel.

R. L. LAMB, a witness called on behalf of the prosecution, having been first duly sworn, testifies as follows:

I am a retail grocer; the name of my firm is R. L. Lamb and Company. I bought sugar for my concern on or about the 13th of April, from the Oglesby Grocery Company and paid for it, twenty cents. Twenty cents a pound. That was standard granulated sugar.

Cross-examination.

By Mr. Watkins:

My place of business is 3 and 5 Linden Street, something like 3 or 4 miles from the warehouse of the Oglesby Grocery Company, which company delivered the sugar to me.

J. M. PHELPS, a witness called on behalf of the prosecution, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Alexander:

My business house is Phelps Brothers Grocery Company. In the retail grocery business in Atlanta. I bought sugar from that concern on or about the 13th of April from the Oglesby Grocery Company, one barrel at twenty cents a pound.

Cross-examination.

By Mr. Watkins:

I did not pay cash for it; my place of business is two miles from the Oglesby Grocery Company's warehouse. Oglesby Grocery Company's truck delivered the sugar.

T. F. MOORE, a witness called on behalf of the prosecution, having been first *been* duly sworn, testified as follows:

Direct examination.

By Mr. Alexander:

I am engaged in the retail grocery business on Ponce de Leon Avenue, Atlanta, Ga., and I bought sugar from the Oglesby Grocery Company on or about the 13th of April, one barrel at twenty cents a pound.

58 Cross-examination.

By Mr. Watkins:

I had been trying to buy sugar a few days before April 13th and could not find any. I did not pay cash for this sugar, which was delivered to me by the Oglesby Grocery Company.

The Government then offered in evidence the written appointment of John A. Manget as Fair Price Commissioner of Georgia, Counsel for defendant making no point on the execution of the appointment, objected to its introduction because it was immaterial and irrelevant and because the Fair Price Committee had no functions under the provisions of the law under which this indictment was found, the functions of such committees being limited to action under Section 5 of the Act of Congress of August 10, 1917, known as the Lever Act.

After argument the Court overruled the objection and permitted the certificate of appointment to be read to the jury.

Whereupon Counsel for the defendant did then and there object to said ruling on the grounds above stated and prayed an exception thereto, which exception is here now allowed and sealed accordingly.

JOHN A. MANGET, recalled for further examination, testifies as follows:

Cross-examination.

By Mr. Watkins (Cont'd):

In the course of the cross-examination Friday I stated I issued general notices of all hearings, that I had those notices in my book but could not find them for some little time, I have not found them since that time, and have not the notice issued before the meeting at which action was taken on sugar. I didn't quite understand that. I thought when I swore that we had issued general invitations for the public to come to all of these meetings, I thought that satisfied you, and I didn't know whether you wanted me to get the newspaper clipping of it or not. I could not swear that there was any particular notice with reference to sugar, or asked all the people to come to a meeting for that purpose; I did not wish to be understood to swear that. I swore the public was invited usually to these meet-
59 ings. I don't know whether there was any particular reference to or an invitation relative to sugar. I could not swear that because that was just one meetings of quite a number, and I could not carry that in my mind.

L. FRANKEL, a witness called on behalf of the prosecution, having been first duly sworn, testifies as follows:

Direct examination.

By Mr. Alexander:

I am in the retail grocery business, with Chamberlin-Johnson-Du Bose Company, and bought sugar from the Oglesby Grocery Company on or about 13th of April at twenty cents a pound. I don't remember whether it was 300 or 500 pounds I bought.

Cross-examination.

By Mr. Watkins:

We buy our sugar where we can find it; it is very hard to find sugar; persons offer sugar to me; if I can buy it I buy it. Prices were given me for sugar about April 13th, 1920; all sorts of prices, and if you want to buy you buy and if you don't buy you don't. It was offered at different prices, some offered me at twenty-five cents a pound, but they wouldn't give me the bill and I wouldn't buy it. Some asked as high as twenty-five cents. At the time I bought this sugar, but they wouldn't give me a bill. After trying the market I bought it where I got it the cheapest.

Defendant offered in evidence stipulation between United States attorney and defendant's attorney stipulating that F. M. Spencer, a special agent in charge, representing the Department of Justice, on the 29th day of August, 1919, wrote and mailed to wholesale grocers

throughout Texas the attached letter; that the explanations following said letter were prepared under the direction of said F. M. Spencer, and mailed out as part of said letter; that in sending out said letter and explanations, F. M. Spencer enclosed the wholesale grocers throughout Texas the return envelope attached thereto.

Attached to such stipulation and offered as part thereof was an official business envelope, requiring no postage, addressed to F. S. Spencer, United States Department of Justice, Dallas, Texas, and a letter signed F. S. Spencer, Special Agent, dated Dallas, Texas, Aug. 28, 1919, requesting wholesale grocers to forward in said attached blank envelope a statement showing groceries on hand Sept.
60 5, 1919, with the cost and sale price thereof.

Following said letter was an explanation, reading:

Blank "Form B" is intended to show cost and selling price you are using on Sept. 5th on certain staple commodities. The cost price you are expected to use is the market or replacement value on Sept. 5th. It is the purpose of the Department of Justice to compare margins jobbers are making now with the margins jobbers were permitted to make under the Food Administration during the war.

To the introduction of said stipulation and connected documents the Government objected on the ground that the same were irrelevant.

After argument before the Judge, His honor Judge Sibley ruled that such objection was good, and refused to permit the introduction in evidence of the papers and stipulations, aforesaid.

Whereupon, counsel for the defendant did then and there object to such ruling, prayed an exception thereto which exception is here now allowed and sealed accordingly.

Defendant then offered in evidence article 1251 of the United States Army Regulations, reading:

"The price at which subsistence stores may be transferred, or sold to officers and enlisted men, is the invoice or purchase price of the last lot of the same variety of subsistence stores received by the officer making the sale or transfer prior to the first day of the month in which the sale or transfer is made; but (1) the price at a post or depot or at the office of the quartermaster will not be affected by the transfer thereto from military posts, except where the article purchased at one post for shipment to another, the former having been regularly designated as a point of supply for the particular article for the latter, in which case the rule laid down in the first five lines of this paragraph will obtain; (2) if two or more lots of the same variety of articles are received on one invoice, or on the same date at different prices, the unit price will be determined by dividing the total value of such lots by the total quantity of the same; (3) the equalization of prices among several varieties of the same article is not authorized, as in the case of several kinds of smoking tobacco, cigars, cra-kers, etc."

61 J. H. McLAUREN, a witness called on behalf of the defendant, having been first duly sworn, testifies as follows:

Direct examination.

By Mr. Watkins:

I live in Jacksonville, Florida, and am in the grocery business and have been connected with the wholesale grocery business since 1895. I am a stockholder in a grocery corporation, and am connected with the Southern Wholesale Grocers Association, as its President. This Association has a membership and territory, practically national, with members numbering a little less than two thousand. I have been its President something over ten years. During my time in the grocery business and my connection with the Southern Wholesale Grocers Association, I have had occasion to learn what the custom among grocers was as to replacement value in fixing their price; that custom is and has been, the prevailing market value shall rule in fixing the selling price of a commodity; that applies to all lines of groceries. That custom generally applies throughout the country, is my impression.

In my duties as President of the Southern Wholesale Grocers Association, I have gone to different parts of the country very frequently. Practically as far west as Chicago, the entire eastern part of the country, and my visits have been frequent to the various jobbing markets of the country. The reason for the necessity of taking replacement value is, the necessity of a dealer having regard to the value of his commodity. To follow the advance is necessary because it is necessary to follow the declines in the market. If a grocer does not do that, he would naturally make a failure of his business. On the 21st of May I, with a committee of wholesale grocers, had a conversation with the Attorney General. In the course of that conversation the Attorney General designated persons to agree with us as to what constituted the cost of sugar. That paper is the definition of cost fixed by the Attorney General. That is the identical paper that was written down at the dictation of the man to whom the Attorney General referred us, Mr. Riley.

Cross-examination.

By Mr. Alexander:

62 This Wholesale Grocers Association is composed of about two thousand wholesalers all over the Southern territory, and I think they are pretty good men. I should say men of average intelligence, perhaps somewhat above the average. Men who, as a rule, are identified with the activities of the communities. Active, prominent, influential citizens.

Mr. Watkins and I discussed the matter with the Attorney General. We suggested a margin of ten per cent under existing conditions would be a reasonable profit and he objected. We recognize

the replacement value as the cost of articles in our stock. That fact was not brought out in the statement I made, but the Attorney General, from our previous correspondence and personal discussions of the matter, understood it. The wholesale grocers ought to be allowed, no matter what he paid for sugar, to sell it at a profit of ten per cent of what it would cost in the market on the day he sold it, the prevailing market price. The replacement value of an article is the prevailing market value through authoritative, responsible sources. It does not have reference to speculative values that we are facing today in the sugar market. The refiners buying the sugar and refining it, are in a position to make the market value. The natural assumption is that the material secured by the refiner is secured in a state of competition and is correct.

A dealer can naturally take into consideration all circumstances surrounding the sale he is making. If the profit he is going to make would be exorbitant profit, an unreasonable profit he would not take advantage of it, but we are assuming on the basis of this act under which we are working that the dealer is called upon to determine what shall be a reasonable profit over and above his cost. I would not undertake to say that a dealer is called upon to follow the interpretation of the fair price committee as to a reasonable profit unless the fair price committee, through a public hearing shall determine for themselves what are the circumstances surrounding the business. I mean investigate the case of wholesale grocery business in any market,—they vary under different circumstances.

63 I do not commit myself to the proposition that a committee could fix a profit on which a merchant is to sell his goods unless thoroughly familiar with all the circumstances of overhead expense and all operating expenses of that business. I mean to say of that particular business on the market under all the different prices of every wholesale grocer. We recognize, I shall repeat, we recognize replacement value as fundamentally sound on any commodity we are selling; it is an economic principle that underlies all sound business. I say it makes a distinct difference between prewar time and the present time so far as the distribution of sugar is concerned, and the position of the grocers, is that if the circumstances of sugar scarcity such as exists now gives the opportunity to the dealer to double the price of what it cost him, that it is morally and legally proper for him to do so. As I maintain we must, in the operation of our business, and as we are in a public business as distributors of the markets for them, we must all nourish our business; we recognize it at all times in the scales of these commodities, those principles of merchandising that have been considered absolutely proper. I do not say the present time is an abnormal time. The abnormal time existed when the wholesale grocers made to reference to profits and prices, which was during the war. It is true that sugar sold cheaper and was really easier to get during the war than it is right now.

We told Mr. Palmer, we felt 10% over replacement value would be a reasonable profit for the wholesale grocer and we would like him to so interpret that language of the statute. As a matter of fact I

think we would have cheaper sugar today if the Government did not have its hands on sugar distribution of the country. For the simple reason that competition would have acted to right the situation and if we had not apprehended that the Government might, under the Lever Act have bought the Cuban crop again, as we were hopeful they would do, there would have been a great deal of cheaper sugar brought in.

64 Mr. Watkins: Offered the paper written under authority of the Attorney General, and identified by Mr. J. H. McLaurin, which reads:

"Cost is invoice price, plus freight to dealer's point, plus interest attributable to the particular purchase, plus delivery from car to warehouse, and wholesaler may make retailer come to warehouse or pay cost of delivery therefrom, plus any other charge attributable to the particular purchase prior to its reaching wholesaler's warehouse."

Admitted in evidence and marked Defendant's Exhibit No. 1.

FRANK LANIER, a witness called on behalf of the defendant (examined out of order), having been first duly sworn, testifies as follows:

Direct examination.

By Mr. Watkins:

I bought sugar in New Orleans about the 12th or 13th of April this year; I bought a car on the 14th for 23 3-4 f. o. b. a little town, about a hundred miles outside of New Orleans. That was plantation granulated and I paid 23¾ for it, and could not have obtained any other sugar at any other price. I tried everywhere, in New York and in the United States, I could not find any. It was all that I could get for delivery. I could get time sugar; I bought some of that broker's sugar to come in August and September and we may loose three thousand dollars on it. I actually made a trade like that from Lamborn & Company, the price paid was I think 21 3-4 cents, is my recollection. Three or four weeks ago. I have to pay for it when it is shipped and then it takes thirty to sixty days to come from the shipper. I don't know when I am going to get it.

Counsel for defendant then offered to prove losses sustained by wholesale grocers in commodities other than sugar. To prove by Mr. E. M. Hudson, A. W. Walker, R. W. Davis, H. Y. McCord, H. L. Singer, Charles I. Brannen, Joseph A. McCord, Frank Hawkins, and D. C. McClatchey that they have lost on canned fish, cheese, lard and lard compounds, and several other commodities, and
65 that those losses have occurred in March, April and May of this year. That such losses range from ten to twenty-five per cent. To which testimony the Government objects because it said such testimony was irrelevant. Said objection was

sustained by the Court. Whereupon counsel for defendant did then and there object to such ruling and prayed an exception thereto, which exception is here now allowed and sealed accordingly.

E. M. Hudson, a witness called on behalf of the defendant, having been first duly sworn, testifies as follows:

Direct examination.

By Mr. Watkins:

My business is a wholesale grocer; I have been engaged in that business over twenty years with McCord-Stewart Company of Atlanta, Georgia. In handling sugar prior to the European war it was bought and sold just like any other commodity, bought on the market and sold on the market. The price—I don't know that I can be exact about that, but the price of sugar for a number of years previous to the war ranged around four and a half, to say, eights cents, different years and different times. If the market was four and a half cents, it was sold on the basis of four and a half cents cost and if it was worth seven cents it was sold on the basis of seven cents cost. The price,—with reference to prices fixed in an instance when prices varied, was fixed like it would be fixed on every other commodity that they handled. They would consider the conditions that might obtain with regard to that particular item. Sometimes they would take the full advance and sometimes they would split it, or possibly would not advance any at all. They would use their best judgment about it. They would always consider the present value in selling; they have to do that. Sugar bought then with reference to paying for it,—the general rule of terms was payable seven days after arrival, and it very frequently—well for a long time it would be the custom in this market that the refiners would send the sugars in to Atlanta and would store them with the jobbers and with the understanding that they would invoice that sugar when the jobber wanted the sugar. More often he needed it after he had sold it. Similar conditions do not exist as to getting sugar and paying for it.

66 The conditions now and in April of this year are and were: the sugar is being offered two ways. One with sight draft and the other is what they call the letter of credit. The difference between the two is that one holder of sugar would be willing to ship it out and to be paid for on presentation of draft to the buyer by the bank, and in the other case they demand that a letter of credit be furnished at the time of the purchase, that letter of credit guaranteeing that the draft will be paid on presentation. That letter of credit must be gotten from the bank. The first method is payment on presentation of the draft, and that is true whether the sugar has arrived or not. And the other method is practically a certified check in that nature; the bank charges the merchant, when he gets the letter of credit. The interests counts

against the merchant when a letter of credit is issued. The authority that would require a dealer to sell at the same time the same article at different prices, for the protection of the dealer, should state who he should sell it to. The dealer has two assets; he has an asset that is valuable to him, possibly more valuable than the actual merchandise he has on hands, and that is the customers, and if he does a thing to dissatisfy one or more customers he is losing money, and you can't satisfy—I can't conceive of any way you could satisfy a customer, he knowing that I had charged another customer less for a thing than I made him pay for it. And I would not know how to explain it to him. I don't see how you could do a successful business that way; you have got to have satisfied customers, to have the customer's confidence if you are to do business. We would lose customers.

67 Atlanta's market for sugar usually, in normal times, since they erected the refinery at Savannah, is in Savannah, and the next market is in Louisiana. Those markets are not open in the regular channel at all times. In the absence of these markets being open, we go for sugar, anywhere we can find it, from New York to San Francisco. In engaging in the grocery business, as in other business, it is necessary to make reserve for loss in the conduct of business properly. It is the same principle of that old thing that is instilled into us from the time we can recollect, that is to lay up for a rainy day. You have got to do that in business just as you have as individuals, because the rainy days come, and if you haven't something to draw from, you will get in a perilous position. It is necessary to buy goods in advance of the time for selling, and that is a risk or hazzard, it is always a risk. Nobody knows what the market is going to be. We can't wait to buy stuff after we have sold it, and then in all of it we of course assume the risk of selling it and the risk of a decline, and we take the chances of advance or decline in all business. That is one hazzard of doing business, that is an element for us to consider in fixing the price for our goods; it is considered in connection with all other matters pertaining to the business. During the war there was a fixed and definite price made by the Government, which was obeyed usually by sugar dealers. When that was done there were two reasons for it. One was that the Government notified the dealers exactly what the next lot of sugar would cost them and the next was that the war was on and the dealers would have done anything that was necessary or that they wanted them to do to hasten the conclusion of the war. During the war the question of replacement value was not involved because we knew exactly what our next lot would cost. That of course made it necessary to consider the replacement value, because it would be fixed. The replacement value is not now fixed by anybody. That is an uncertain value.

68 If the sugar is of a different grade of sugar than your trade wants or it is a character of sugar that you can't sell them if they have got the kind that they have been accustomed to. That is one of the big difficulties right now. You have sugars,—

sugars are offered to you now on such descriptions as Guatemala granulated, Java granulated or certain kinds of sugars; we had some offered to us the other day from Bohemia, to be shipped by Hamburg to New Orleans, on description. That was offered to furnish a low grade of sugar, which was to be shipped from Bohemia, and when it would come you could not know; it might be ninety days, or it might be nine months. We have had offered to come through San Francisco, some from different places. You don't know what the sugar is, but we do know that the merchants in this section will not buy anything but standard granulated sugar.

The market price of an article is that price at which you can buy it and at which it is regularly offered in the regular way. That is what I understand. I think we had sugar offered to us there around April 13, 1920. I can't be positive right now, at say around twenty-five cents at New Orleans.

Cross-examination.

By Mr. Alexander:

In pre-war times the price of sugar to the wholesaler ran from four and a half to seven or eight cents. It varied a good deal. And at that time we paid for the sugar on seven day's after arrival. We handled sugar, in a very large measure, as a matter of accommodation to our customers. That was one consideration. It served as advertising, in a way. There was a profit in it, but not a large profit; the profit was smaller than on other things. The profit on a barrel of sugar, on a full round market it would run from 25 to 50 cents, a hundred pounds. That would be about ¼ of a cent per pound. There was not enough profit in it to handle it at that, to handle the sugar by itself and nothing else.

60 In all the mercantile business I know of they work on the order of the law of averages, that is both in regard to prices and markets and expenses. You sell some stuff, every day you sell some stuff that costs you more than you have to sell it for; you sell it for less than it costs you, and you sell some other stuff sometimes for less than the average cost of doing business, and your regular business was to keep all those things generally on a kind of average up to the end of a period—so that the average at the end of a period was in your favor. After the European war came on, sugar began to come higher to the wholesaler, to my recollection, it began to increase some. After the war ended, up to the first of last July the sugar equalization board handled the sugar and everybody knew what it was going to cost them then. When Mr. Manget's committee was organized here, the Fair Price Committee was reorganized under Mr. Manget; along about the last of August, we were buying sugar at nine cents and sold it at about 9.65; we handled a great deal of sugar at that price. McCord-Stewart do a very large business and 65 cents a hundred pounds was the margin the Government allowed to wholesalers.

I was a member of the Fair Price Committee, at that time, Mr. Alexander, the profit was—I think the profit was fixed by the Equalization Board, at any rate it was fixed by some Governmental authority. When Mr. Manget took charge, along last August or about that time, I became a member of the committee, and attended some of the meetings; there were changes, several changes authorized by the Committee, it seems to me. My recollection is it started in at 65 cents, that was during the time that the price was fixed—what I mean there was no fluctuation, no decline and no advance, the basis was nine cents. Then after the Louisiana sugar came on the market, when there was no fixed price to it there was a change made to conform to that Louisiana sugar. I don't recollect what that was. Then it was changed, sixty-five cents at one time and one dollar at another, and a dollar twenty-five at one time, and I understand since I have been in here it has been a dollar and a half at one time.

70 The Louisiana sugar, the first movement began in October or November and when the Louisiana crop first came in there was still some sugar coming from the Savannah refinery, and the other Cuban raws, that continued to sell at nine cents and twelve cents, to the consumer. When the Louisiana crop came there was no way of controlling that price, that is my understanding; there was no way to control it. They put it on the market and sold it first in New Orleans as high as twenty-two and three cents; there were a great many prices on it; I think it opened at about twelve cents; it went up and finally settled back to 18 and 19, or 17 and 18 cents, I think. That recession from uncertainty of price on the exchange in New Orleans was brought about by pressure of the Government, brought to bear on the planters down there along in October and November. It is a fact that Louisiana sugar began coming in here universally at seventeen and eighteen cents at the plantation. And at the same time the Government Cuban crop was still being sold at nine. It is also true that with even that condition of affairs, it was practically impossible to get sugar, it is a fact that consumers were oftentimes willing to pay any price that was asked to get sugar. After that time, until the Government crop was exhausted this year, we continued to sell the standard granulated at nine sixty-five, is my recollection. We continued to sell the equalized sugar at nine sixty-five because we bought it with the understanding that we were to sell at the sixty-five margin. I think that Louisiana sugar was sold open. What I meant by selling it open was this, that if a man had—if he had sugars in his house, had different purchases and different costs, he used his own judgment where he had these prices, about averaging the price, if I am not mistaken. I don't say the Committee did, but it would be impractible, from a dealer's standpoint, to handle it in any other way. We sold Louisiana sugar on the basis—we sold it on the margin that the committee here stated for Louisiana sugar, but now as to the averaging different costs of sugar, my recollection is that that was the common practice everywhere, and I don't conceive of a dealer handling it in any other way. In this — Louisiana sugar

which was on the market and afterwards granulated got plentiful and there was all kinds of a cut in prices of the Louisiana
71 sugar to get rid of it, to sell it out, and here along about the first of April there was a rumor that there was going to be a big drop in sugar, and there was a local cut in the price here, by the wholesaler. Well, about what you can do with a thing and what you would do with a thing—now we received a carload of an article the other day and the day we received it we got notice of a decline in the market of four cents a pound. The day we received that a large part of the country and the portion of the country that this particular product came from, had an embargo on Atlanta on account of this local strike, so that I could say reasonably that there was a shortage of it. We could have sold that, notwithstanding the decline in price, because there wasn't any coming in. Instead of doing that, we got notice of the decline in the price of four cents a pound, and when we got that we reduced our price six cents a pound. That was voluntary on our part. A merchant simply has got to take it, the loss—if it becomes current that there was a drop of five cents a pound in sugar. I understand there is sugar coming in to Atlanta that cost on a basis of thirty cents delivered here. If a customer of mine would take my advice he would not buy any of that sugar.

When we were selling sugar on a narrow margin, prior to the war, we delivered it the same as we do now. The grocery business has been quite prosperous for the last year or two. I suppose about in line with other business.

C. T. BAILEY, a witness called on behalf of the defendant, having been first duly sworn, testifies as follows:

Direct examination.

By Mr. Watkins:

I live in Columbia, S. C., and am engaged in the wholesale grocery business, selling sugar, rice and things of that kind, with the firm of Bailey Distributing Company. The Bailey Distributing Company bought New Orleans sugar in November, 1919, at eighteen cents f. o. b. the country refinery. Some of that arrived at our place January 7th, 1920, 750 bags. We weren't able to sell it all during the month of January and February on account of the fact that they had other sugar, better sugar at a cheaper price and on account of one of the dealers or two of the dealers there
72 having some of this same plantation granulated at the same price mine cost and some better sugar at a better price. I first set the price at nineteen cents, that is what it cost me up to that time, and I put the price at eigheen cents and sold a little of it and some of it I sold way down to fourteen. It averaged about fourteen and a half cents. I haven't the exact figures on it, but that is my judgment. It cost me about nineteen cents a pound.

Cross-examination.

By Mr. Alexander:

The character of that sugar is off grade, what is known as plantation granulated sugar. Grocers won't handle it at all if they can get the standard granulated. The last we got I think we paid twenty-three cents for in New York.

A. W. WALKER, a witness called on behalf of the defendant, having been first duly sworn, testifies as follows:

Direct examination.

By Mr. Watkins:

My firm's name is Walker Brothers Company, which has been engaged in the wholesale grocery business about nineteen years. Prior to the war the custom in fixing the selling price of goods when they fluctuated in value was that prices were based on what the next lot would cost. That was applicable to doing business in sugar; we obtained our sugar prior to the war, and now from New York, New Orleans and Savannah. Prior to the outbreak of the war there was no special hazard in handling sugar. In the regular lines of commerce and merchandizing we had no special hazard. There is a particular hazard and there was early in this year, in handling sugar in Atlanta. We had to go out of the regular lines to obtain sugar; we have suffered loss in handling sugar. In one instance we had a considerable loss on a car that had been damaged in transit, and the loss was attributable to irresponsible parties and we could not recover. The loss occurred by the refiner loading it into a car where there were nails in the bottom of the car and when the claim was made the carrier who hauled it declined the claim on the ground that the condition should have been attended to by the loader. The amount of the damage was ninety-five dollars.

73 Under conditions prior to the war that would not have happened, or if it had happened, we could have fixed the loss and recovered it. It might have happened, however, but in the regular lanes it would likely not have happened. It has transpired that it was an irresponsible party,—it moved out of the regular lanes and we cannot fix the responsibility who can meet the damage. During the war we made on handling sugar, at one time it was, I think, thirty-five cents a hundred pounds, later it was sixty-five cents a hundred pounds, but that was not profitable to the dealer. It was handled at a loss. In March, 1920, we sold sugar at seventeen and a quarter cents on a cost of sixteen and a quarter, the first part of April, we sold at sixteen and three quarters on the same cost. The market was weak and it was generally understood that sugar would be considerable cheaper, and we got information to stand from under our sugar. And so we reduced the price. In business

this rise and fall of prices and loss can be prevented in only one way; that is by taking advantage of the advance when there is one. We could have bought sugar April 12th at from twenty-four cents to, I think, about twenty-five cents. After April 12th we bought sugar at about twenty-eight cents, I think it was.

The elements of cost of handling sugar in Atlanta, for wholesale grocers, is the invoice cost, of course, and there is the freight to Atlanta and there is the drayage to the store, and there is interest on the investment, if interest is paid, those things enter into it and enter always into it, not in this particular sugar but always there are those elements of cost. There are handling charges from the car to the warehouse, I included that in the drayage. cartage from the car to the warehouse, storage in the warehouse, is a general item of expense, just in the regular rental business, it is not a particular item,—I would not consider that. Delivery to the retailer is taken care of in the overhead expense, the delivery by us to the retailer, and was not included in the price of this sugar, but it is a cost that must be incurred. In my answer I am only including the things that are ordinary. There was no extra cost in this thing and the cost in handling this sugar was about one cent a pound.
74 From that I excluded the delivery from our store to the retailer. The per cent of profit I made on that lot of sugar was about five per cent, that does not justify handling sugar. We sustained a considerable loss on a purchase of sugar we made on a letter of credit that was never filled, the contract was never complied with; we are being sued for brokerage on the transaction, amounting to a thousand dollars or more.

Cross-examination.

By Mr. Alexander:

I suffered a loss of ninety-five dollars on a shipment of sugar because there was some nails in the bottom of the car; I suffered another loss of a thousand dollars because of buying under an alleged contract. It is not an actual loss yet, but I say we are being sued for it. The loss is impending. We had some other losses on sugar recently by selling at less than it cost us, actually cost us. This sugar I refer to I presume was recently, it was December probably, where we had overbought, we had some sugar we got to dispose of and we transferred two cars of sugar to other points and I think the charge against us in each instance was probably four hundred dollars a car. We paid it back for their handling it for us; their broker sold it for us; we told him we had overbought on sugar, had too much and told him to sell it for us and he did. I think there were two car loads, but just in pounds I don't know how much. It was Louisiana plantation granulated. We have a truck to cart the sugar. We are peculiarly in the L. & N. Terminal and they do not allow foreign cars in there. We operate trucks. Cartage is a fixed charge, we could haul twenty barrels at one load, but we don't always do that, however. It is more often the case

that it comes from the car that we haul it in, because our volume is so great. This hauling costs about ten cents a hundred. We sometimes get a truck by the hour for just a special load, our trucks would be busy and I would have to get a truck, and of course, and probably about ten cents a hundred is about what it made on them. Our trucks are crowded and I just step out and get a public truck by the hour or by the hundred pounds. They have to haul
75 it from Raley Brothers warehouse, that is—well less than a mile. I don't know just how far. We pay an hour for the truck some four dollars an hour sometimes.

Defendant offered in evidence wire for 350 sacks Mexican granulated sugar sold to Walker Brothers for 28 cents net, New Orleans, wire dated April 12th.

R. W. DAVIS, a witness called on behalf of the defendant, having been first duly sworn, testifies as follows:

Direct examination.

By Mr. Watkins:

I am in the wholesale grocery business, with the firm of R. W. Davis & Company, and have been in the wholesale business about eighteen years. The custom among grocers before the war was to base prices on replacement cost of the commodity. To base the selling price on the replacement value of the article, that applied to sugar. On April 12th, 1920, I had offers to sell me sugar, Argentine granulated f. o. b. New Orleans, banker's guarantee, at 23 cents per pound, net cash. There are differences in the selling of sugar now, such as drayage and selling costs and other items than prior to the war. It is now more than double. The cost of drayage has gone up since prior to the war, about four times, I think. Labor to handle it has increased about three times as much. The cost of delivery by the wholesale dealer, has gone up about four times as much. There are differences in the rates of interest now and prior to the war. Interest is higher. The average distance we have to deliver sugar, by Atlanta wholesale grocers, in the Atlanta territory, is I would say, about two miles. We don't do a city business,—we do very little in the city business, occasionally we do, but there are grocers scattered all over the City of Atlanta. Some of them eight or ten miles from the center of the town.

Cross-examination.

By Mr. Alexander:

We deliver very little in the City. We are paying laborers about three twenty-five a day. We are paying thirty cents an hour and thirty-two and a half, some of them,—some fellows that have been with us the longest. Before the war, five or six years ago, we could get all the labor we wanted for ten cents an hour.

76 This telegram is simply an offer that somebody made to sell some Argentine sugar at twenty-three cents. I was afraid of it, that it would fall and cause us a loss, we have eight or ten barrels of sugar on hand, which we are selling at a profit of one cent a pound; we used to sell it, I always figured ten per cent on it prior to the war. When sugar costs five cents, I sold it at five and a half. Ten per cent on the invoice cost. If grocers pay the higher price the way they are now, from twenty-six and a half to twenty-nine cents, it is so unstable they are afraid to take hold for fear of a loss. There is not more demand for it than they can accept, I saw some quotations on more sugar than I ever heard of before offered at one time, from New York, for future shipments a few months hence. I think you could get all you want now if you were willing to pay the price they ask for it. I think it is anywhere from twenty-five and a half to twenty-eight and a half cents on the market. They are asking twenty-five and a half, and if we pay that we must get it. I have heard, as a matter of fact, that a great deal of sugar is being sold at thirty cents. And I bought at twenty-five and a half. I could sell it without trouble at twenty-six and a half; I don't think you can sell all you can get. It seems to me that there is a plenty of sugar if you are willing to pay the price and bring it here. Grocers are just afraid of it; afraid of the higher prices; afraid the market will decline with them. I have been afraid to handle this high priced sugar.

Redirect examination.

By Mr. Watkins:

I am handling sugar for a cent and a half a pound, but that is not a fair price; I am handling it because it is the rule we must handle it for that. The fact that the Government limits the price has something to do with the small quantity of sugar that the wholesalers care to handle. That is the effect it has. Sugar has been fluctuating downward for the last few days. That is one of the risks that a man takes in buying sugar. That is the reason that I haven't bought any sugar,—afraid of it.

Recross-examination.

By Mr. Alexander:

I have seen prices as high as twenty-nine cents, and I have seen some recent prices at twenty-six and a half. They were
77 prices for future delivery.

Mr. Watkins: This is a telegram from M. G. Gelpia & Company, to R. W. Davis & Company, dated April 12th, 1920.

"We offer subject to being on hand two thousand bags average weight hundred pounds Argentine granulated sugar guaranteed ninety-nine test prompt shipment from source at twenty-three cents f. o. b. New Orleans duty paid, terms net cash presentation document and banker's guarantee necessary."

SAM GOLDSTEIN, a witness called on behalf of the defendant, having been first duly sworn, testifies as follows:

Direct examination.

By Mr. Watkins:

I am a wholesale grocer of Atlanta, Georgia, and have been in the wholesale grocery business about eight years. Prior to the breaking out of the European war, the custom of wholesale grocers to basing the selling price on the replacement, was the replacement value was always considered. That applied to sugar as well as other commodities. About a week before April 12, I bought sugar in New Orleans at 28 cents on an irrevocable letter of credit; I have not received that particular sugar yet. I couldn't tell you why it has never come in; I guess on account of railroad delay. It was necessary to buy that sugar before it arrived and pay for it, payable on demand, this paper was payable on demand, whether the sugar has arrived or not, that is the method of buying sugar at this time, so I understand. I paid this bill and the sugar has not yet arrived.

Cross-examination.

By Mr. Alexander:

Before the war my custom was when selling sugar to take into consideration the advanced price and make my selling price accordingly. Of course — some few instances it is probably we did not, but as a general rule it was. If I bought granulated sugar at five cents and by the time I got it in sugar had gone up to six, I would base my selling price on six cents and take a profit on that, instead of on the five cents. If it goes up too much—sometimes it depends on the condition of sugar in sight at the time. If we could get it we would get it.

78 If there was a plenty of sugar selling at five and a quarter or five and half, I would meet the competition, would not go up. We would have to meet the competition. If we could get the price, following out the general line with our trade, we would do that. If I bought at sixteen cents and had that sugar in town, and the next lot was going to cost me twenty-eight, I would not expect to get twenty-nine or thirty. I don't know that we would get an unreasonable price, you think, twenty-nine, might be unreasonable,—probably would be. According to the rule laid down a while ago, I ought to get all I could, but we take into consideration the condition of the times, we can't go to the trade and demand the price. That would be out of reason. We haven't had that condition to contend with and I couldn't tell you whether we would or not. That condition never came up so far as fifteen cent sugar jumping to thirty cents. We haven't been allowed to get it. If I bought under the conditions quoted here at sixteen cents, and before I put it in our warehouse it went up to twenty-seven here, it is a sound business principle to raise it to that value. That has been the custom. That was the custom before the war and it ought to be now.

H. Y. McCord, a witness called on behalf of the defendant, having been first duly sworn, testifies as follows:

Direct examination.

By Mr. Watkins:

I am of the firm of McCord-Stewart Company, a wholesale grocery house of Atlanta, Georgia; I have been in the grocery business over thirty-five years. Prior to the outbreak of the European war, I was familiar with the method of doing business of the wholesale grocers in Atlanta and surrounding territory. The method with reference to fixing the price when there was a rise in the price after the goods were bought, was, if there was an advance we advanced. If there was a decline we declined with the market. We were forced to do that; I mean where there is a decline but not an advance, but I believe that if we did not advance we would be forced out of business. I think that any reputable merchant with ability to do much business that was the custom. It is a necessary method of doing business. There are losses because the price- of goods frequently go down in the wholesale grocery business, we got a car car load of stuff last week that cost thirty-four cents, and we were notified that the
79 price was twenty-nine. It is tru- in the wholesale grocery business that goods go up and down, and a grocer has to buy his goods sometimes ahead of the time he expects to sell them. That being true, it is necessary to go with the market, both up and down.

Cross-examination.

By Mr. Alexander:

In this pre-war condition, I think we paid from four and a half to seven and a half for sugar. The market varied. We followed the market if the market advanced; we got from a quarter to a half a cent a pound on it. Based on the invoice cost—invoice plus freight. That was the rule. It was always sold on a narrow margin. It was a staple article. The practice was if I bought at five cents to sell at five and a quarter or five and a half based on invoice plus freight on a steady market. The profit on sugar, except on an advancing market, rarely ever reached the percentage of cost of doing business. It was almost always under.

If the situation was such that I could not advance with the market, for instance I bought it at five cents and it went up to seven, and when I tried to sell at a profit over replacement value of seven cents I found that there was active competition here, offering it at five and a half, less or more, less than seven, I could not get replacement and profit. I usually held the sugar until the fool sold his out and got my profit. I don't mean fool in an offensive sense, but a business man who does not, on a staple article like sugar, follow the market up is a fool business man. On the other hand, if I bought sugar at five cents and the market went down, I met it. I went down too. I don't remember,—there might have been some time when the mar-

ket was bare of sugar in pre-war time, but very rare. If you could go up I went up, so far as the market went, and if it would go down I went as far as the market went, and competition usually made me go down. If competition kept us from going up I don't remember, it might have done so, but as I said awhile ago, we usually kept our stuff, and if it went up you would follow the market or keep
80 your stuff. That is my idea of a proper business practice, was to follow the market up if you could. Well, you are asking me questions and I am swearing to them. If I bought sugar at sixteen cents and got in a car load and there wasn't but very little sugar in town, the sugar went up, I would believe in following the market. Reasonably so, but in the wholesale grocery business, it is a man's trade that he is dependent on and I think the wise wholesale merchant usually tries to take care of his trade and doesn't try to hog them, but give them stuff they can sell all the time on the market and I believe that if a man gets sugar in that cost him eighteen cents and the market was in a bad condition and it went up to twenty-nine or thirty, I believe that a wholesale merchant would be a pig if he charged his regular trade that much for it. It is a fact under this testimony that from the day Mr. Albright got in his sugar at sixteen cents, which he was selling at twenty, he would have to pay twenty-five, twenty-seven and twenty-eight cents. That was the market price, it was as low as they could buy sugar, and as Mr. Davis testified to, a great meny people would not buy it. We declined to buy it; we were advised by the refiners that sugar was going to be cheaper and we kept out of the market, and as I understand the refiners kept out of the market. It didn't get any cheaper, we might as well have bought, but you see we didn't know that till after it occurred. If you will pardon me for giving you one case, we bought sometime ago a car load of sugar and we sold it at a price of six or eight cents less than we were offered for it by a manufacturer here in town to take the whole business, but we distributed that sugar in twenty-five, in hundred pound bags all over town, took it out of the barrels and had a loss of about three thousand dollars on it. By selling it for less than I was offered for it. I think it is right for a man to take his advance, if it advances from nineteen cents to twenty-nine cents on a steady market on that, I think it is right, I think he is entitled to it, but you forget that I said a wholesale man had a certain line of trade that he has been selling probably for years, and he would only defeat his profit with them and would not want to take it. If
81 a man had that opportunity to go from 18 to 29 cents and under practical competition here in the market and did not have a line of customers, and had that opportunity to make a great big profit, I think ninety-nine men out of every hundred would take it. I don't think that his conscience ought to restrain him, if he bought that building over there for two hundred and fifty thousand dollars, and sold it for a million,—trades like that have been made all round town here. I don't think there has been any suffering on account of sugar, I do not. If there had been any suffering that could be supplied I think it ought to be supplied, but I don't think there has been any suffering. I think the shortage in sugar is caused

by the hoarding on the part of the housewives all over this country. I saw one lady on the car the other day who wanted me to sell her a hundred pounds of sugar, and I said "Haven't you got any sugar?" and she said "I have got a hundred and sixty pounds and I want a hundred more." I think it is very common.

WILLIAM H. H. PHELPS, a witness called on behalf of the defendant, having been first duly sworn, testifies as follows:

Direct examination.

By Mr. Watkins:

I am a merchandise broker and sell sugar. I am acquainted with the market value of sugar. Mr. Goldstein testified that he had bought some sugar at twenty-eight cents, a week before May 18th, 1920, and that he has not received it; the present value of that sugar is twenty-six and three-quarters. He has lost the difference between twenty-eight and twenty-six and three-quarters.

Cross-examination.

By Mr. Alexander:

I sold this sugar to Mr. Goldstein, this twenty-eight cent sugar. That was Mexican granulated. And I sold it at twenty-eight cents. I think I sold about that time three or four cars at the same price, twenty-eight cents. That was due to the fact that sugar was very scarce, I presume it was. If it had been so plentiful, it would have been, as some other witnesses have testified here, four or five cents. The price was due to the scarcity.

82 EDWARD E. SMITH, a witness called on behalf of the defendant, having been first duly sworn, testifies as follows:

Direct examination.

By Mr. Watkins:

I am a broker and do a general brokerage in different lines of commodities, grain and food lines, especially. I have been in that business about fourteen years. In that business I come in contact with wholesale grocers, and know of their method of doing business. Prior to the war there was a custom among wholesale grocers as to basing their reselling price on the cost of the item sold, the cost at the time of selling them rather than the cost when originally bought, or the replacement value as it is generally spoken of. The selling of the goods is based on the market value, by the trade generally as I understand it. The market value at the time the sale is made, that is a general custom. I have a telegram quoting sugar, April 16th, Nicaragua white granulated, delivered in New Orleans, April, May and June, twenty-seven fifty f. o. b. New Orleans, letter of

credit, payable demand draft. The other quotation, Portland, Oregon, thousand tons Java white granulated, July and August shipment from Java, twenty-two cents net cash, duty paid to San Francisco shipping weights, letter of credit, advise to be established on confirmation. The freight from San Francisco here is a dollar seventeen per hundred.

JOSEPH A. MCCORD, a witness called on behalf of the defendant, having been first duly sworn, testifies as follows:

Direct examination.

By Mr. Watkins:

I am Chairman of the Board of Directors of the Federal Reserve Bank of Atlanta. Prior to becoming connected with the Federal Reserve Bank, I was Vice-President of the Third National Bank of Atlanta, started with it and organized it as Cashier. That was from 1906 up to 1914. Since 1906 I have been in the banking business. I was in the Mercantile business prior to that time. I was in the mercantile business for eight years in Carrollton, Georgia. From my experience as a merchant and a banker, I am acquainted
83 with the custom of wholesale grocers, and other lines of business, of fixing their sale prices, on the market value at the time of selling. I was acquainted with the custom when I practiced myself in my own business, and I was told what was done in the wholesale business. I was not in the wholesale business.

The custom was this; that if they bought a shipment and had the shipment come in they based their profit largely upon that shipment. Of course if that shipment came in and in the meantime a decline should happen, they would have to reduce their price or not sell the goods. If the price advanced, why they would enhance the price. I was traveling salesman for Abbott Brothers, wholesale grocers of Atlanta during the year 1880 and '81.

As a banker I have to keep up with credits, and the way people do business that deal with my bank. From my knowledge as a banker, that custom has been continued since I have been out of business. So far as I know, and we have that very question, because if we find that a house is not living up to good practice we generally watch their credit pretty close. A man who did not follow that method of doing business, it would depreciate his credit rating in making discounts.

Cross-examination.

By Mr. Alexander:

I have never been in the wholesale grocery business personally, I was traveling salesman for Abbott Brothers for two years. If a man bought, a wholesale grocer bought a stock of stuff, some staple, and got it in and after that time the price for it on the market declined, he would have to go down, or not sell his goods, one or the other.

It was the practice to go down. A man ought to try to treat his trade fair; he would have to if he expected to hold his trade, he would have to treat them right. If they found out the market was less, he would have to go down. The man would be under obligation under those circumstances to go down at a loss to himself. I know they do and have done it myself. When there was no competition to force me down. If a man bought a stock of commodities and got them in, and after he got them in the market went up, then he went up. He did that because he could. Of course, because somebody else would not sell at any less, and he could get his price. Probably if he wanted to exhaust his stock of
84 goods and have to replenish his stock at a higher price or just wanted to go out of that line of goods, may be the rule would be varied, and I have done that. If there was another man there with a very large stock of goods and he didn't follow the market up then no one could follow it, until the other fellow sold out. He would be under no moral consideration that would restrain him from going up, that I can see, sir, because he has got to go down when the decline is on him. If it went up to an enormous extent, I wouldn't say in consideration for his customers, he ought to divide his profit with them, I should think not. If a man has cotton on hand and it goes up ten cents he goes up ten cents a pound more, and if it goes down five cents he gets five cents a pound less.

H. L. Singer, a witness called on behalf of the defendant, having been first duly sworn, testifies as follows:

Direct examination.

By Mr. Watkins:

I am in the wholesale fancy grocery business, and do not handle sugar. I know the custom among wholesale grocers prior to the war as to using replacement value as the basis for their selling prices. They usually followed the market. When the price goes down they reduce and when the market goes up they follow the market upwards.

Cross-examination.

By Mr. Alexander:

They invariably follow this custom unless there are extenuating circumstances. A man might have more stuff than he wanted to handle and he would take advantage of that to handle it. That is the usual custom ninety-nine times out of a hundred though. The wholesaler loses on a decline and he has got to make enough on the advances to overcome his losses, which are bound to follow; just as sure as the tide comes in it is bound to go out, you know. The losses of dealers in this day and time are not imaginary. I can testify to that. There might be considerations when the merchant might not take all the advance; sometimes his patrons understand that he did

not take the value for it and consequently he could not do it and he has got to watch the market and take what you can get, and if you can get your full advance you should get it, that is business. Without restraint of conscience or anything else because you have got to stand your losses.

I. J. PARADICE, a witness called on behalf of the defendant, having first been duly sworn, testifies as follows:

Direct examination.

By Mr. Watkins:

I am in the wholesale grocery business and handle sugar. In handling sugar at this time and under conditions as they exist today, I meet with difficulties, different from the usual former method in handling it. We have first to borrow the money, but first we have hard work to get the sugar and then have to borrow money to buy it with, which is high and then it is hard to get transportation, and we haven't got anything to distribute it and we have to put it in small packages and pay for small deliveries. We haven't enough to supply the trade, and we make it up in 25 and 50 pound packages. We have to buy paper bags or cotton sacks and put it in them and send it out and the packages break or get wet and we have a loss on them. It don't come to us in those small packages and we have to repack it. We have to truck it out as far as fifteen miles, up to Chamblee. And we have to truck it from the car to our warehouse. The ordinary cost of trucking sugar from the car to our warehouse is ten cents a bag. The packing for twenty-five pounds would be at least ten cents, with the bag—ten cents for twenty-five pounds. The fair cost for delivery from our warehouse, taking the average of deliveries, long distance and short distances, we figure twenty-five cents. Twenty-five cents a stop; that is the minimum.

Cross-examination.

By Mr. Alexander:

We sell very much sugar, a good deal if we have got it. I just got in a car, 400 bags, Friday, in hundred pound sacks. That came in hundred pound bags, but some people they want fifty pounds and twenty-five pounds and I pack that.

During the sugar scarcity it happened every time I got a lot of sugar, I had to do it. I am not just magnifying one little instance of that sort and trying to give the court the impression that an entire car load of sugar, or two or three were handled that way. I have done all my sugar business in twenty-five pound sacks. I have to deliver it. In other words I get my load of sugar fifty or a hundred bags and I take the trouble to divide them into four hundred or five hundred small packages and ship them out. I have many customers in this territory, that I deliver to by

truck. I had to, if I didn't I would lose my trade. No, advertisement, just to keep the trade, and the man that didn't get it I lost them. Some of the retailers come and buy, say, twenty-five dollars worth of stuff if you give them sugar, and if you don't give it to him he will go somewhere else.

T. J. BROOKE, a witness called on behalf of the defendant, having been first duly sworn, testifies as follows:

Direct examination.

By Mr. Watkins:

I am in the wholesale grain and feed business. That business has a custom about taking replacement value. We have to sell on the market, regardless of whether it goes up or down. That is the custom now as well as prior to the war.

J. H. BULLOCK, a witness called on behalf of the defendant, having been first duly sworn, testifies as follows:

Direct examination.

By Mr. Watkins:

I am a retail grocer and have been in the retail business something like twenty-five years. The custom to the trade prior to the war was always to follow the market. If I bought goods at ten cents and when I went to sell they had gone up to fifteen cents I would consider the market price at the time of selling them. The market value. Competition compelled me to go down with the market.

Cross-examination.

By Mr. Alexander:

I always go up because I feel that I am justified. Of course there might be times when I would not follow the full market, but we generally follow it if the turn goes that way. We generally have to go down. Competition is pretty strict. I go down because competition forces me, and in going up I try to cover the loss I have to take. I am on the Fair Price Committee and was in October last, when the price was fixed of one cent a pound margin of profit. I made the motion to make it one cent, I think, because the wholesalers had only been allowed sixty-five cents, and I thought it ought to be a little more, the price of sugar and expense had gone
87 up. That was one reason. They had been complaining all the time they weren't getting enough profit on it. When the price continued to advance and the expenses were a little stiffer, along in April I moved to go up to a cent and a half. The Fair Price Committee unanimously agreed to that as a fair price.

Atlanta, Ga., June 8th, 1920, 10 A. M.

Pursuant to adjournment the trial proceeded.
Present: The same counsel.

SAM H. SALTZMAN, a witness called on behalf of the defendant, having been first duly sworn, testifies as follows:

Direct examination.

By Mr. Watkins:

I am in the wholesale grocery business at the L. & N. Terminal Building, Section 3, Atlanta, Georgia. I handle sugar. I have bought sugar that I lost on. I bought some barrels of crystal sugar and plantation granulated that I stand a loss on. On three cars over a thousand dollars; the market went against me. The market went down and I went down with it.

Cross-examination.

By Mr. Alexander:

That was sometime in February, on all three cars. I bought from Bishop C. Perkins, New Orleans, at sixteen and a half f. o. b. New Orleans and eighteen cents. I paid sixteen and a half in February for part and eighteen for clarified and plantation granulated. That was delivered in New Orleans. I sold some at sixteen and a half and sold some at seventeen; shipped to Smithville N. C., and they shipped it back and I had to pay the freight on it, because they had sugar cheaper when it reached there than they had paid to me. I sold the sugar by sample and the purchaser claimed it did not comply with the sample. I did not sue him, just stood the loss. I then sold it for what I could get for it. Some of it I advertised in the newspapers and it cost about two hundred dollars. At that time there was a supply; there was about five car loads that rolled in at that time as a less price than I paid. In February I could get it at fourteen and a quarter and thirteen and a half, and the American Sugar Refining
88 Company was quoting twelve and a half cents. I did handle several car loads of very unusually low, kind of brown sugar here. That was the most inferior looking sugar I ever saw, and the reason I had to handle it was because I was forced to handle it; I couldn't get anything else. I don't know anything about moonshiners, but you seized some of it, you seized a car. That I sold to the South Carolina man who turned it back on me because it didn't come up to sample. I had to sell that at a loss. It wasn't exactly plantation granulated. It was clarified sugar. They turned it down on the ground that it was not a good quality. That is what they said but they turned it down because they could get granulated at
less price.

D. F. McCLATCHEY, a witness called on behalf of the defendant, having been first duly sworn, testifies as follows:

Direct examination.

By Mr. Watkins:

During the war I was connected with the Food Administration. I was finally known as executive secretary, as such Dr. Soule of Athens was Food Administrator for the State, and as Executive Secretary I had full charge of the Atlanta office where the whole business was done. I attended the meetings of the Food officers in Georgia and the Food Administration in Washington, practically once a month. The margin over cost of sugar fixed at thirty-five, later fifty and sixty-five, were fixed in conference, and in my small way I participated in fixing the margin. During the war and previous I was in close touch with the grocery business during my service with the Food Administration. I don't think that we had but one or two formal meetings, but I was in daily, you might say hourly touch with the grocers as individuals; some I sent for, some came to see me. I was in charge of the enforcement of the regulations. I had monthly reports from every dealer and from every wholesale dealer and jobber in Georgia, and those reports showed the cost of doing business. From my experience with those reports and from the other sources I gathered I was familiar with what would have been a reasonable profit during the war. From having been raised in the grocery business and after my two years' experience in the Food Administration, I would judge that I know something about the cost of handling sugar. Qualifying the
89 statement of having been raised in it, my father was in the grocery business thirty-one years, and from a mere child until I came to Atlanta to go into business, I was working in the store. Those two charges were added to the item of cost, and the thirty-five, fifty and sixty-five respectively. There was another charge where sugar was sold on time, for the point was raised and a request was made that we allow them to charge interest. It had to be actual service performed, however, or full payments for sugar. The Government bought and sold sugar during the war. It bought the Cuban crop of sugar. In fixing the Cuban crop, the Government gave consideration to the high cost in purchasing the Louisiana crop. The purpose of the correction by this sugar equalization board was to protect the Louisiana growers, who had informed us that they could not and would not produce sugar if they had to compete with the Cuban price. So that the price was fixed by the Government on what was purchased of Cuba was based on the price in Louisiana, on a further margin to the grower in Louisiana. The Government made profits in the business. I can't tell you in the aggregate it was about thirty-two million dollars, or thirty-seven million after all expenses were paid.

Cross-examination.

By Mr. Alexander:

Herbert Hoover was United States Food Administrator, and the State Administrator was Dr. Soule; I was secretary of the State Food Administration, here in Georgia. Dr. Soule appointed me, or rather nominated me. The appointment came from Mr. Hoover. My duties were confined to the situation in Georgia. We had conferences practically each month in Washington of the State food administrators together with those engaged with the administrative work of the food administration in Washington, and attending these conferences would invariable be a representative from the Grain Corporation, from the Sugar Equalization Board and from other Boards with them. Whenever the question of sugar was being discussed a representative or representatives from the Sugar Board would be present. Those were informal conferences. I attended in whatever official position I had. I participated in the conferences and did a good deal of talking. I say the Government made thirty-five million dollars from dealing in sugar; I know that from a statement made by Mr. Hoover when I was present at a dinner at his house. He said they had made a profit of thirty-two
90 million dollars. I am sure that he made the statement. I don't think, in fixing the price of the Cuban crop that they at that time had under consideration the margin of profits they were going to allow jobbers. That was another matter. Their consideration in fixing the price of the Cuban crop was to fix such a price as would protect the Louisiana grower, in order to induce him to grow sugar and more sugar. The best information of that fact, Mr. Hoover wrote the administrators a letter, it was written to President Wilson, and suggested a discount, and described what they expected to do, and in that letter he did not state any amount; he just stated that the profit realized from that would be an enormous amount of money. That, was about—I won't attempt to be exactly accurate on that, it was approximately November or December, 1917.

When I was functioning with the Board the margin of profit allowed the wholesaler was sixty-five cents. That was the last margin. The Board, as originally constituted, quit functioning about the early part of 1919, as I recall it. Shortly after the armistice, within a few months after. About three months, I would say. It didn't go out of business entirely. As a matter of fact there are some remains of it there now, still matters unsettled or unfinished. That condition continued until along in July or August, 1919.

When Mr. Manget's committee began to function I attended the meetings at first, I think one, perhaps two. There was a pretty representative attendance there from merchants and citizens generally. As I recall it, the only way that sugar and flour were touched was the statement that certain margins had been fixed and that the committee could not and should not go into that. And I think that I am the one that made that statement to the com-
91 mittee, that since those were already fixed in Washington, I did not think the committee had any authority over those.

Mr. Watkins: I offer certain documents—telegrams sent by the Oglesby Grocery Company and the replies thereto, in which the Oglesby Grocery Company, from April 6th to April 12th—April 8th to April 12th, asked different refiners to sell them sugar and quote them sugar, and their replies stating that they had no sugar.

The first telegram is one sent by the Oglesby Grocery Company on April 8th, to Arbuckle Brothers, New York City:

Reply April 9th, reading: "We are unable to handle new business at present and in fact we cannot state when we will be in position to do so."

The next telegram April 12th to Arbuckle Brothers, calling attention to the fact that "for many years we have sold your coffee and have not received any sugar from you. We are in critical position account of sugar shortage and feel that you should allot some to us."

Reply, dated April 13th, "Acknowledging your telegram of the 12th, we regret exceedingly our inability to favor you with sugar. We are at present heavily oversold and entering no new business."

The next telegram, April 8th, sent to the Federal Sugar Refining Company: "Please do not overlook us in making allotment of sugar."

Reply dated April 9th: "With reference to your wire of the 8th, would say that unfortunately our position is such that we can do nothing at the present time."

The next telegram to William Henderson, New Orleans, reads: "Will you ever be in a position to furnish some sugar," dated April 3rd.

The answer: "We did not wire as we did not have any sugar to offer."

Telegram, Franklin Sugar Company, dated April 5th, to the Oglesby Grocery Company: "Wire received. Not for some time." In answer to their request for sugar.

Next a letter dated April 10th from William Russell & Company, New York and New Orleans: "We have received your telegram asking us to buy three cars of fine granulated sugar. We have
92 not been able to buy any sugars for shipment to your part of the country."

April 10th, Oglesby Grocery Company to Bishop C. Perkins, New Orleans: "Have you forgotten that we handle sugar."

Reply dated the same date: "Sugars have been so scarce that as soon as we get any we have ten buyers for each car load. The only sugars we have had recently are some sugars refined on plantation from Cuba or Porto Rican raws; in order to sell these sugars in your territory we have to bring them to New Orleans paying the freight from plantation to New Orleans and lose the difference and therefore most all the sugars have been going west of the Mississippi river, where the same rate of freight applies as to New Orleans. Then again your territory has been getting cheaper sugars from Savannah than we can buy this Non Bone Black Sugar. At the value of raws today the factories could not buy raws and sell granulated under 21c.

Telegram, April 3rd, to Young Griffin Coffee Company, New York City: "Can you buy us some fine granulated sugar. Arbuckle not offering here, but may sell you."

Reply under date of April 5th: "Your telegram in regard to sugar reached us Saturday afternoon after the sugar houses were closed for the day. We took the matter up this morning, however, and are very sorry to report that it is absolutely impossible to buy a pound of sugar here now for anything like prompt shipment but even if we could buy it we could not ship. The big strike here has absolutely shut down the shipment of any freight of any kind."

Telegram of April 3rd, to W. R. Grace & Company, New York: "Can you buy for us some fine granulated sugar." Signed Oglesby Grocery Company.

Answer to that, dated April 5th: "We are in receipt of your wire inquiring concerning fine granulated sugar. We regret that we are not handling this grade of sugar at present, but will be glad to quote you in case we have some in the future."

Another letter from W. R. Grace & Company, New York,
93 dated April 16th: "Replying to your favor of the 8th instant, we regret to advise that we have no sugar to offer for either spot or future shipment at this moment. We have cables out in several directions in an effort to secure further quantities and if we are successful we will wire you."

Admitted in evidence and marked Defendant's Exhibits Nos. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 20, 22, 23, 24, 25, and 26.

A. W. WALKER, recalled for further examination, testifies as follows:

Direct examination.

By Mr. Watkins:

The quotations on refined sugar, by the American Sugar Refining Company, is now twenty-two and a half cents. They offer at that price sugar till December 1st, 1920. The effect of that twenty-two and a half cent price on grocers who have bought at twenty-six-seven and -eight sugar, is very depressing. They are facing heavy losses, even from my knowledge of the grocery business.

Cross-examination.

By Mr. Alexander:

I have some sugar coming here, bought recently from twenty-four to twenty-five and up to twenty-eight cents. I bought it in New Orleans. Granulated sugar. It is bought for June and each month's delivery in succession. I think that if I telegraph the American Sugar Refining Company they will promptly deliver the sugar up to December, at twenty-two and a half cents. From their office, where sugar is usually made. They have offices in New Orleans and also New York. I guess we have got between fifty and sixty thousand dollars of sugar, already contracted for, for delivery in successive months, June, July, August and September. This twenty-two and a half cent price goes into effect immediately. That is American

Sugar Refinery sugar. They have two refineries, one at New York and one at New Orleans. I know the statement is made that jobbers who have invested in sugar face a grave loss, and if so we are the sickest folks—It is published in the newspapers,—in the daily press. I have got the clipping. Not going down but twenty-two and
94 a half cents put on sugar till December. That being the market then, I expect to drop my price on sugar that I have already bought. I am going to use my best judgment on it and stand from under to the best advantage I can.

Defendant offered in evidence and read quotations from the Journal of Commerce of New York, giving sugar prices as follows:

Apr. 10th issue, showing quotation of Apr. 9th at New York 16.85c. per pound. Raw sugar quoted, duty paid, spot price 17.29c. per pound. With the statement that one of the refineries was not in the market.

Issue of April 12th, quoting sugar of April 10th at 17.10c. per pound. Cuban raws, duty paid, at 17.59c. per pound.

Issue of April 13th, quoting sugar on April 12th at 17.30c. per pound. May futures at 17.40c. per pound. Cuban raws at 17.59c. per pound.

Issue of April 14th, quoting sugar as of April 13th at 18.05c. per pound. May futures at 17.55c. per pound. Cuban raws, duty paid, at 18.29c. per pound.

Issue of April 15th, quoting sugar as of April 14th at 18c. per pound.

Issue of April 15th, quoting sugar as of April 14th, at 18c. per pound. May futures at 18c per pound. Cuban raws, duty paid, at 18.54c. per pound. With the statement in all quotations that the Federal, American, Arbuckle and Warner Refineries were withdrawn from the market.

Defendant closed.

95 JAMES LYONS, a witness called on behalf of the prosecution, in rebuttal, having been first duly sworn, testifies as follows:

I am in the wholesale grocery business at 22 Central Avenue, Atlanta, Georgia, and have been since last November. I have been a stockholder in a wholesale house in Louisville, Kentucky, I suppose twelve years or better. In my present business I have the usual expenses that other wholesalers have, in cost and interest; they have some expenses we do not. I have rent, employees, deliveries, interest, and I have men employed in my place of business, I think about twelve. There is expenses that I do not have that other grocers do, they travel men and we do not. There is no other expense, that I know of. My company pays no dividends in the ordinary sense. We pay Mr. Creasy one-half of one per cent on the volume of business done. The only expenses, the dividends and traveling men, that I do not have that the other grocers have. My business is conducted like any other grocer's

business. I buy and sell. The margins of profits on the cost I allow to pay expenses outside of what I pay Mr. Creasy, runs different on different articles. We handle sugar and flour on a one per cent basis. Mr. Creasy gets one-half of one per cent and that leaves us one half. I have one half of one per cent on sugar and flour for the purpose of paying expenses of doing business. On other articles, three per cent. I do not get the three per cent where I don't handle the goods, but one per cent. I call goods I sell without handling, anything that is drop-shipped from the factory. That is where I don't take it out of the car, but pass it on to our customers. We do not have more than three per cent on anything. Our company has other stores elsewhere. They have been carrying on that sort of a business in the United States, twelve years or more. They have never failed to make expenses on that,
I think not. Out of the three per cent, no one gets any-
96 thing out of it except Mr. Creasy himself, and he gets one-
half and the business gets the other two and a half per cent. We have a car of sugar on the track bought, I believe last February. It cost us fifteen and three-eighths cents, I believe. It has been here a few days. I don't know just what date. I have not unloaded it yet. We quoted this sugar out to our customers at seventeen cents; it is standard granulated. We are actually going to sell it at seventeen cents. And make enough to pay expenses of operations. We will not really charge that full seventeen cents; I don't think so. We have no way of arriving at the exact cost on that sugar until it is in and we get the freight bills and everything and figure on the exact cost, and we quoted this sugar at seventeen cents to be on the safe side. As soon as it is in and checked off and we know the amount of sugar and what it actually cost, we give them,—if this seventeen cents is more than the amount that sugar cost we give it back to them in the way of a rebate or credit account, as they elect. We figure elements of cost in determining what to base our one per cent on or our one-half per cent. Transportation, demurrage, whatever it may be, the invoice cost, transportation, demurrage if any. Possibly there might be a little demurrage on this car. If the figures should come that it cost seventeen cents exactly, I would value the sugar at seventeen and seventeen hundredths per pound. Seventeen cents on a hundred pounds is supposed to pay all of the expenses of the business. If it, were meat, and it cost thirty cents, I would sell the meat at thirty cents and charge three per cent for handling. That would be nine-tenths of a cent, or thereabouts. I would sell that meat to our customers at thirty and nine-tenths cents. Creasy Company has operated on that basis for twelve years. They have fifty-one stores.

Cross-examination.

By Mr. Watkins:

I do not have one of those Creasy contracts I make with dealers; we make a contract with a dealer by which he gives us three

hundred dollars for the privilege of doing business with us. We don't use that as expense of doing business, it is just a service contract. He gives us three hundred dollars for our selling goods to him. I don't know what becomes of the three hundred dollars. It is my understanding that it belongs to the retail merchant; it is always his. Creasy first started being a corporation, and possibly when he found that prosecution was begun under the "blue sky" laws, he changed and adopted this contract system. I am a stockholder in the first Creasy house organized. That is the Louisville house. That house is the same as this company here; it is a sub-ordinate corporation; just a house of the Creasy chain. The retail merchants owns it; it is not a stock company. The retailer invests his money; we are operating on his money; we are operating on the money of the retailer, and don't consider any return on the investment in arriving at our profit; we came here without any money and get the retailers of Atlanta to put up the money and what we give them on that money is in lower cost of merchandise. We haven't any investment to consider. All other wholesale grocers have investment. That sugar, I think, cost sixteen twenty-six here, as near as we could get at it; we bought at Cleveland, Ohio, from a broker at Cleveland, Ohio, to be shipped from Philadelphia or New York. It cost fifteen and three-eighths at Philadelphia or New York; we have to pay the freight from there here. We have our own trucks; it costs something to operate those trucks, but we do not charge that as a part of the cost. Only freight and demurrage if there is any demurrage. The demurrage, I do not think, is as much as ten dollars a car, per day after the first forty-eight hours free time. We quoted seventeen cents in order to be on the safe side. We didn't know where the sugar was coming from, whether New York or Philadelphia. I stated that we quoted it at seventeen cents before the sugar arrived. We have no way of verifying the exact cost. We make the retailer pay a margin, so he pays the seventeen cents cash, and billed to him at seventeen, seventeen. We bill to him at seventeen cents a pound, one per cent would be seventeen, seventeen. He pays seventeen, seventeen, and then
97 when we get through and find the cost has not run that
98 high, we pay him back. We do. Our business is done on a cash basis, and by these men who put up this service contract with us.

Redirect examination.

By Mr. Alexander:

Except in the matter that the retailer makes these advances, we have all of the other expenses, except traveling, that any other grocer has. This sugar was here on the track before we knew it had ever been shipped, and the Federal Reserve Bank called me up the other morning and says: "we have a draft here, for a car load of sugar, and you have till one o'clock to take care of it." It was then possibly ten or ten-thirty; that gave me two hours to

get up the ten thousand dollars. I got it by borrowing it and paying interest. That is an ordinary occurrence in business. Our trucks cost per day, allowing for depreciaton and everything, about eighteen dollars a day; we charge that to general expenses. The cost and everything else is paid for out of this profit of one-half of one per cent.

This three hundred dollars that the merchant puts up is put up in installments or cash. The service contract lasts twenty years and he has a right to transfer the contract. What I mean by selling for cash, if this man has paid up his contract in full, he has a credit with us of three hundred dollars and no more. If he fails to pay his bill, that is charged against the three hundred dollars, which is all the capital we have to do business on; we pay no dividends on that.

Recross-examination.

By Mr. Watkins:

I borrowed that money to pay for the sugar for ten days. I don't remember the exact amount of interest, I think the interest on it is possibly some eighteen or nineteen dollars. I don't remember the exact rate. We haven't got this sugar yet; it is on the track in the car. We borrowed the money one day last week, something like a week lacking a day or two.

99 JOHN A. MANGET, a witness for the prosecution, recalled in rebuttal, testifies as follows:

Direct examination.

By Mr. Alexander:

The elements of cost to be taken into consideration under the definition of cost, besides the invoice cost and freight, interest attributable to that purchase, delivery from car to warehouse, and any other charge applicable to that particular purchase, as stated by the Attorney General, to be added, are no serious feature in the cost of the sugar. Wholesalers are allowed seven days' time to pay for it after the sugar arrives at their depot or side-track or station, and then they are allowed at the end of that seven days a discount of two per cent off the amount of the invoice, which would figure at the price of this sugar thirty-two points as a cash discount. Thirty-two cents on a hundred pounds. Carloads of sugar are delivered at the siding that belongs to the merchant, when they have sidings and cost of such delivery. The highest rate I ever heard would figure 1/10 of one per cent.

Cross-examination.

By Mr. Watkins:

The same methods of paying for sugar do not obtain as formerly; sugar is sold on irrevocable letters of credit. I don't know how

much is sold. I have heard that that was tried here in Atlanta for sugar when there was such a demand for it. I know that the cost incident to hauling has been greatly increased in the last few years. I used to haul 2,500 pounds of sugar for 25 cents, but the price I just gave was in accordance with some witness yesterday who swore that the cartage charges were as high as ten cents a sack of a hundred pounds. While it takes, in addition to the cartage, somebody to unload the sugar, from the car to the dray and from the dray to the warehouse. That goes in the cartage of it, as I understand it, to take it out of the car. Grocers here have to keep a regular set of laborers on hand at all times to unload cars. I always kept the men pretty busy. I had six, seven or eight, and I think they were all kept busy. You know handling sugar, like every other article, is just a small part of their duties. It takes some time and some cost to load from the warehouse to the
100 retailer. I would think that the cost of doing business, was above what Mr. Lyon said his largest profit was, three per cent; I would consider it above that. I know a large majority of the stuff handled a wholesale grocery store never gets ten per cent.

J. L. PATRICK, a witness called on behalf of the prosecution, in rebuttal, having been first duly sworn, testifies as follows:

Direct Examination.

By Mr. Alexander:

I am a deputy collector *if* Internal Revenue. As such deputy collector I have in the last year had occasion to sell sugar. Sold at public sale, here in Atlanta, right in front of this building. I expect there was a hundred bidders. I suppose a thousand pounds of it,—there were thirty *of* forty sacks I never counted them. At that time sugar was retailing in the stores here at about twelve cents a pound. Mr. Alexander told the crowd that under the law this sugar had to be sold at public outcry—and that the price of sugar was twelve cents, and it made no difference what they paid, they could not sell it for over twelve cents. A limit was put on the amount anybody could buy of one sack. Mr. Alexander told them not to bid over twelve cents; that he didn't think it proper to do that.

After the announcement was made that merchants would not be allowed to sell it, if they bought it, for more than twelve cents, I don't remember whether any merchants bid or not. The sugar brought all the way from twenty-six to thirty-one cents. The date of that sale, as I remember it was the 17th day of November.

Mr. Alexander: We close your honor.

The Court: Anything further for the defendant.

Mr. Watkins: Nothing further, Your Honor. I want to urge that motion. I don't know, unless Your Honor asks for it, I do not care to argue it at this time.

The Court: It seems to be governed by a previous ruling, but if you want to be heard from?

101 Mr. Watkins: Unless Your Honor asks it I do not care to argue it at this time. I just want to urge it at this time.

Upon the close of the testimony, and before the argument on the charge of the Court, defendant made a written motion in open Court, asking the Court to direct a verdict for the defendant, which motion is as follows:

1.

The statute on which the indictment herein is based is unconstitutional and void for the reasons, among others, as follows:

(*a*) Conditions existing on April 13, 1920, do not justify the employment of the war powers of the Constitution.

(*b*) The Act is an unconstitutional attempt to delegate the legislative powers of Congress.

(*c*) The Government in the indictment and on hearing relies on a price fixed by an alleged Government agency, and as no hearing was had, fixing said price, and the law and facts were disregarded, the defendant is denied due process of law, and equal protection of law.

(*d*) Said law is in violation of Paragraph 1 of Section 2 of Article 4 of the Constitution of the United States, in that it denies to citizens of one State privileges and immunities granted to citizens of other States.

(*e*) Said statute is void, in violation of Paragraph 1 of Section 2 of Article 4 of the Constitution of the United States, for that the statute, as administered, denies the equal protection of the laws, and is not uniform in its application throughout the several States of the Union.

(*f*) Said statute violates Paragraph 1 of Section 2 of Article 4 of the Constitution of the United States, for that, as applied by the various agents of the Department of Justice and Price Fixing Committees throughout the country, a different standard of reasonableness of charges has been made in different States.

(*g*) Said Act violates Paragraph 1 of Section 2 of Article 4 of the Constitution of the United States, and the Fifth Amendment thereto, for that in said Act exemption is made of its application to farmers and others; and in that in the enforcement thereof by the President, dealers in meat, rice, canned goods, and other
102 food products have been exempted from its application.

(*h*) The statute under which this indictment is found is void in violation of the due process clause of the Fifth Amendment to the Constitution in that it does not operate on all alike, and is so wanting in a basis for classification as to produce a gross and patent inequality as inevitably leads to a denial of due process to this defendant.

(*i*) Said statute is void, because in violation of Article 5 of the Amendments to the Constitution of the United States and deprives this defendant of its property without due process of law, and takes its property for public use without any and without just compensation.

(*j*) Said statute deprives persons of property and takes property without just compensation, for that the value of such property is not considered, and only the cost thereof is taken as a measure of value, and therefore the statute violates Article 5 of the Amendments to the Constitution of the United States.

(*k*) Said statute is void and in violation of Article 5 of the Amendments to the Constitution, in that it seeks to take a citizen's liberty and property without due process of law and indictments thereunder are void in charging an offense without adequately defining the offense.

(*l*) Said statute and the indictment drawn thereunder are vague, indefinate and uncertain and charge no crime.

(*m*) Said statute and the indictment drawn thereunder violate the Sixth Amendment to the Constitution of the United States for that neither informs defendant "of the nature and cause of the accusation."

(*n*) Said statute is unconstitutional and void because a judicial determination of what is a reasonable price is "beset by such deterrents" as to deprive defendant of its constitutional right to due and equal process of law.

2.

The testimony presented by the Government shows the commission of no crime.

103 After argument on said motion, the Court overruled the same, to which ruling the defendant then and there excepted. Its exception was duly noted and allowed by the Court and is here now sealed accordingly.

Prior to the charge of the Court and the argument of Counsel, Counsel for defendant, Oglesby Grocery Company, requested the Court in writing to give the jury the following instructions:

1.

Cost, as used in the indictment, and as used throughout this charge means the price paid, or contracted to be paid when the sugar was bought, plus the freight paid to transport said sugar from the place where it was bought to Atlanta, Ga., plus interest on the investment in the sugar, calculated from the time the sugar was paid for until the sale thereof was made; plus the reasonable and necessary charges in removing and delivering the sugar from the car in which it was shipped to the warehouse of Oglesby Grocery

Company; plus the cost of delivering the sugar from the warehouse of Oglesby Grocery Company to the retail merchant to whom it was sold, plus any other charge attributable to the particular purchase of sugar prior to its reaching the warehouse of Oglesby Grocery Company.

The Court refused to give said instructions, and, while the Jury was still at the bar of the Court, defendant, Oglesby Grocery Company, then and there excepted, and its exception was duly noted and allowed by the Court, and is herenow sealed accordingly.

2.

It is not sufficient evidence of the cost of the sugar for the Government to establish the price paid therefor by Oglesby Grocery Company to the Savannah Sugar Refining Company and the freight paid for transporting said sugar from Savannah to Atlanta.

The Court refused to give said instruction, No. 2, and while the Jury was still at the bar of the Court, defendant, Oglesby Grocery Company, then and there excepted, and its exception was duly noted and allowed by the Court, and is here now sealed accordingly.

104

3.

The burden is on the Government to establish the cost of the sugar, as cost has already been defined.

The Court refused to give said instructions No. 3, and, while the Jury was still at the bar of the Court, defendant, Oglesby Grocery Company, then and there excepted, and its exception was duly noted and allowed by the Court, and is here now sealed accordingly.

4.

If sugar, alleged to have been sold, cost more than 16.269¢ per pound, you will fine the defendant not guilty.

The Court refused to give said instruction No. 4, and while the Jury was still at the bar of the Court, defendant, Oglesby Grocery Company, then and there excepted, and its exception was duly noted and allowed by the Court, and is here now sealed accordingly.

5.

If you believe that defendant's officers who sold the sugar described in the indictment acted in good faith and believed that it had the right to sell said sugar at the price it was sold, you will find the defendant not guilty.

The Court refused to give said instruction No. 5, and while the Jury was still at the bar of the Court, defendant, Oglesby Grocery

Company, then and there excepted, and its exception was duly noted and allowed by the Court, and is here now sealed accordingly.

6.

The Court directs you that in determining what is a just and reasonable charge to be made in handling and dealing in sugar that you must take the value of the sugar at the time the sale was made by the defendant, and if you find that the value of such sugar had increased since it was acquired by defendant, defendant is entitled to the benefit of such increase. If therefore, you believe from the evidence that the sugar alleged to have been sold in this case was, at the time it was sold, of a market value in excess of that alleged in the indictment or if the Government has failed to prove such value, you will find the defendant not guilty.

105 The Court refused to give said instruction No. 6, and while the Jury was still at the bar of the Court, defendant, Oglesby Grocery Company, then and there excepted, and its exception was duly noted and allowed by the Court, and is here now sealed accordingly.

7.

Value means what the sugar was worth in the market on the day of the sale. In determining what such value was, you will consider offers to sell or buy and market quotations and from all the facts determine what was the present value of sugar on April 13, 1920, and the cost to defendant is not a standard of value.

The Court refused to give said instruction No. 7 and while the Jury was still at the bar of the Court, defendant, Oglesby Grocery Company, then and there excepted, and its exception was duly noted and allowed by the Court, and is here now sealed accordingly.

8.

In determining whether or not the defendant sold sugar at an unreasonable rate or charge, you will determine from the evidence first the market value of the sugar at the time it was sold. The fact, if you believe it to be a fact, that the sugar increased in value over what it was bought for, must be considered by you, as you cannot base your verdict solely on the freight charges and amount paid for the sugar.

The Court refused to give said instruction No. 8, and while the Jury was still at the bar of the Court, defendant, Oglesby Grocery Company, then and there excepted, and its exception was duly noted and allowed by the Court, and is here now sealed accordingly.

9.

"Willfully," as used in the indictment implies on the part of the defendant a knowledge of the facts, and a purpose to do wrong. It means a voluntary act with a bad purpose, and without ground
166 for believing the Act to be lawful. Before you can convict the defendant, you must believe from the evidence beyond a reasonable doubt that the defendant knowingly without ground for believing the act to be lawful, with a bad purpose and with a purpose to do wrong, made a sale, or sales, of sugar as alleged in the indictment.

The Court refused to give said instruction No. 9, and while the Jury was still at the bar of the Court, defendant, Oglesby Grocery Company, then and there excepted, and its exception was duly noted and allowed by the Court, and is here now sealed accordingly.

10.

Neither the so-called profit of 1¢ per pound, nor the profit of 1½¢ per pound, claimed by the Fair Price Committee to have been fixed as reasonable in the sale of sugar, is valid, there having been no notice to defendant, defendant not having been heard when said charge or charges were fixed, the Committee not having considered all the elements of the cost.

The Court refused to give said instruction No. 10 and while the Jury was still at the bar of the Court, defendant, Oglesby Grocery Company, then and there excepted, and its exception was duly noted and allowed by the Court, and is here now sealed accordingly.

11.

You are further charged that because in fixing such charge no consideration was given to value, the charge fixed by the Committee is void.

The Court refused to give said instruction No. 11 and while the Jury was still at the bar of the Court, defendant, Oglesby Grocery Company, then and there excepted, and its exception was duly noted and allowed by the Court, and is here now sealed accordingly.

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12.

The indictment in this case alleges that the defendant made an unjust and unreasonable charge, and further alleges that it made a charge of 20¢ for selling sugar, and that a reasonable charge for selling sugar was 17¾¢. These allegations appear in each of the indictments. The Government contends that "charge" as used in the foregoing allegations should be construed as meaning price. You are directed that the indictment as drawn is valid, but that if it

is construed to mean price, the indictment is so indefinite as not to charge a crime, and, as the evidence shows you that a less than 17¾¢ per pound charge was made by defendant for dealing in and handling sugar, you are directed to render your verdict for the defendant.

The Court refused to give said instructions No. 12 and while the Jury was still at the bar of the Court, defendant, Oglesby Grocery Company, then and there excepted, and its exception was duly noted and allowed by the Court, and is here now sealed accordingly.

13.

If the evidence fails to convince you beyond a reasonable doubt that defendant acted wilfully, as wilfully has been defined to you, you will find the defendant not guilty.

The Court refused to give said instruction No. 13 and while the Jury was still at the bar of the Court, defendant, Oglesby Grocery Company, then and there excepted, and its exception was duly noted and allowed by the Court, and is here now sealed accordingly.

And thereupon, and after the presentation of said requests, numbers 1 to 13 inclusive, and after the argument of Counsel, the Court proceeded to charge the Jury.

108 And thereupon before the Jury retired and while it was still at the bar of the Court, the defendant, Oglesby Grocery Company, then and there excepted to the following instructions given by the Court to the Jury, to wit:

The Government says that a just and reasonable rate had been fixed by the President through the agency of the Attorney General and also through the agency of the Fair Price Commission at Atlanta. Evidence has been introduced as to what these agencies of the President had determined to be a fair and just rate in handling sugar at wholesale. That evidence has been admitted before you for what you think it is worth. It is not conclusive; it is not a judgment; the Oglesby Grocery Company was never called before either one to have a hearing about it so that a trial could be had to fix the thing. It is admitted only as prima facie evidence as to what the Attorney General and the Fair Price Commission decided was just and reasonable.

And said exception was then and there duly entered and allowed by the Court.

And thereupon before the Jury retired and while it was still at the bar of the Court, the defendant, Oglesby Grocery Company then and there excepted to the following instructions given to the Jury, to-wit:

This Section 5 of the Act authorizes the President, through such agencies, to determine what is a just and reasonable profit, the language is not "a just and reasonable rate," and it is a little different. Just and reasonable profit,—that word "profit" might have a good many significations in the minds of different people. One man might say that profit is the difference between what a commodity cost and what it is sold for. That is what I have told you that the rate and charge was. Another man might think that ought not to be considered profit but that profit is only what a man gets clear, after

paying all his expenses of every sort in connection with it. Here it becomes important, therefore, in considering the finding, both of the Attorney General and the Fair Price Commission, to know what they thought profit was, and in looking at all the circumstances
109 they dealt with; you have to know that in order to tell how much the compensation ought to be and what they found.

And said exception was then and there duly entered and allowed by the Court.

And ther-upon before the Jury retired and while it was still at the bar of the Court, the defendant, Oglesby Grocery Company, then and there excepted to the following instructions given by the Court to the Jury, to-wit:

The word "wilful" was read to you from the statute. There has been some discussion about that. Wilful means a deliberate purpose to do the thing that was done. It means that there wasn't any mistake about it or any accident that got a man into something he did not intend. It does not mean in this connection that the defendant knew or believed that what he did was just and reasonable. If in point of fact the charge made was unjust and unreasonable, and unjust and unreasonable beyond a reasonable doubt in your opinion, and they deliberately made that charge wilfully, then there would be a wilful exaction of an unjust and unreasonable charge within the meaning of this statute. I call your attention to that meaning of the word "wilful" because there has been some discussion about it. Whether or not there was any accident or misfortune or misunderstanding that might render the making of an unjust and unreasonable charge not wilful under the circumstances in this case, it is for you to say, or whether the defendant did make willfully an unjust and unreasonable rate or charge, as set out in the charge. If so they are liable to be convicted under this indictment, and if not they are not liable to be convicted, of course.

And said exception was then and there duly entered and allowed by the Court with the explanation as follows:

That is to say that it must have been done with a bad purpose, with the purpose to do wrong and without reasonable grounds to believe or know it to be unlawful. I intended to say what I said.

Said March term 1920 of said Court has not yet adjourned
110 and within said term and in furtherance of justice, and that right may be done, the defendant, Oglesby Grocery Company presents the foregoing as its bill of exceptions in this case, and prays that same may be certified and allowed and signed and served as provided by law.

EDGAR WATKINS,
(WATKINS, RUSSELL & ASBILL,)
Attorneys for Defendant Oglesby Grocery Company.

The foregoing Bill of Exceptions is correct in all respects, and is hereby approved, allowed, and settled, and made a part of the record herein in open Court.

This 30 day of June 1920.

SAM'L H. SIBLEY,
United States Judge.

Filed in Clerk's Office June 30, 1920. O. C. Fuiler, Clerk, by C. A. McGrew, Deputy Clerk.

111 In the Supreme Court of the United States.

THE UNITED STATES
v.
OGLESBY GROCERY COMPANY.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judge of the United States District Court for the Northern District of Georgia, Northern Division:

Because in the record and proceedings, as also in the rendition of the verdict and judgment between the Oglesby Grocery Company, a Corporation, Plaintiff in Error, and the United States of America, Defendant in Error, wherein the constitutionality of a law of the United States was drawn in question, and wherein it was contended that the law under which said proceedings were had was violative of the Constitution of the United States and immunity was claimed under said constitution and the decision was against the title, right, privilege and immunity especially set up and claimed under said Constitution; manifest error hath happened to the great damage of the said Oglesby Grocery Company, a Corporation, as by its complaint appears. We being willing that error if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this Writ, so that you have same in the said Supreme Court at Washington within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States

112 should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States the 30 day of June, in the year of our Lord One Thousand Nine Hundred and Twenty.

[Seal U. S. District Court, N. D. Georgia.]

O. C. FULLER,
Clerk United States District Court,
Northern District of Georgia.

Writ of Error granted, this 30 day of June, 1920, and supersedeas bond fixed at $4,000.00.

SAM'L H. SIBLEY,
Judge United States District Court,
Northern District of Georgia.

Filed in Clerk's Office Jun. 30, 1920. O. C. Fuller, Clerk, by C. A. McGrew, Deputy. Recorded in Minutes, No. 44, Page 635.

113 In the United States District Court for the Northern District of Georgia, Northern Division.

THE UNITED STATES

vs.

OGLESBY GROCERY COMPANY.

UNITED STATES OF AMERICA, *ss:*

To the United States and Hooper Alexander, United States District Attorney:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington in the District of Columbia within 30 days from date hereof pursuant to a Writ of Error filed in the Clerk's Office of the United — District Court, Northern District of Georgia wherein Oglesby Grocery Company is Plaintiff in Error and the United States is Defendant in Error, to show cause if any there be why the verdict and judgment rendered against said Plaintiff in Error as in said Writ of Error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel H. Sibley, judge of the United States District Court for the Northern District of Georgia this 30 day of June in the year of our Lord Nineteen Hundred and Twenty.

[Seal U. S. District Court, N. D. Georgia.]

SAM'L H. SIBLEY,
Judge United States District Court,
Northern District of Georgia.

114 Due and legal service of the foregoing citation, the petition for Writ of Error, the assignment of errors, the Writ of Error, and all other and further proceedings connected with the Writ of Error from the United States District Court for the Northern District of Georgia to the Supreme Court of the United States acknowledged, and all other and further service and notice of any kind or character whatsoever waived.

This 30 day of June, 1920.

WM. L. FRIERSON,
Solicitor General.

Filed in Clerk's Office, Jul- 10, 1920. O. C. Fuller, Clerk, by C. A. McGrew, Deputy.

115 *Præcipe.*

To the Clerk of said Court:

Oglesby Grocery Company, Plaintiff in Error, directs you to forward to the Supreme Court of the United States with the Writ of Error the parts of the record which it thinks necessary for the consideration of the errors assigned:

1. The Indictment herein.
2. The Demurrer to the Indictment filed by Plaintiff in error.
3. The opinion and judgment of the Court on the Demurrer.
4. The plea of not guilty.
5. The Verdict and Judgment thereon.
6. Petition for Writ of Error.
7. Assignment of Errors.
8. Bond.
9. Bill of Exceptions.
10. Order Allowing Writ of Error.
11. Writ of Error.
12. Citation in Error and acceptance of service thereon.
13. This designation of parts of the record with service thereon.
14. Clerk's Certificate.

This 30 day of June, 1920.

EDGAR WATKINS,
(WATKINS, RUSSELL & ASBILL,)
Attorney for Oglesby Grocery Company,
Plaintiff in Error.

4th Nat'l Bank Bldg., Atlanta, Ga.

116 Service and copy of the above and foregoing designation of the record, accepted, and all other or further notice and service waived and it is agreed that said designation states all the facts of the record that *is* necessary to a clear understanding of the error complained of. June 30, 1920.

HOOPER ALEXANDER,
United States District Attorney.

Filed in Clerk's Office, June 30, 1920. O. C. Fuller, Clerk, by C. A. McGrew, Deputy Clerk.

117 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Northern District of Georgia,
Northern Division:

I, Olin C. Fuller, Clerk of the District Court of the United States for the Northern District of Georgia, do hereby certify that the foregoing and attached 116 pages of printing and writing contains a true copy of the record, Writ of Error, Assignment of Errors, Bill of Exceptions and all proceedings in the case of Oglesby Grocery Company, a Corporation, Plaintiff in Error, versus The United States, Defendant in Error, being No. 3754 Criminal, as specified in the Præcipe of counsel therein as fully as the same remains of record and on file in my office at Atlanta, Georgia, except that the Original Writ of Error and the Original Citation with Acknowledgement of Servise thereon are included therein in the stead of a copy thereof.

In testimony whereof I hereunto set my hand and the seal of said District Court *of* Atlanta, Georgia, this 16th day of July, A. D. 1920.

[Seal U. S. District Court, N. D. Georgia.]

OLIN C. FULLER,
Clerk United States District Court
for the Northern District of Georgia.

Endorsed on cover: File No. 27,814. N. Georgia D. C. U. S. Term No. 457. Oglesby Grocery Company, plaintiff in error, vs. The United States of America. Filed July 26th, 1920. File No. 27,814.

(1961)

No. 457

Supreme Court of the United States

OCTOBER TERM, 1920

OGLESBY GROCERY COMPANY,
Plaintiff in Error,

versus

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR

By

EDGAR WATKINS

(WATKINS, RUSSELL & ASBILL
Fourth National Bank Building
Atlanta, Georgia)

Attorney for Plaintiff in Error.

JOHNSON-DALLIS CO., PRINTERS, ATLANTA, GA.

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PART I.

General Statement of the Case.

(a) *The Statute.*

The Congress on August 10, 1917, Chapter 53, enacted a statute entitled,

> An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel. (40 Stat. C. 53, page 276.)

Section 5 of this Act, so far as it is here material, authorizes the President when he

> shall find it essential, to license the importation, manufacture, storage, mining, or distribution of any necessaries, in order to carry into effect any of the purposes of this Act.

This section further provides:

> Whenever the President shall find that any storage charge, commission, profit, or practice of any licensee is unjust, or unreasonable or discriminatory and unfair, or wasteful, and shall order such licensee, within a reasonable time fixed in the order, to discontinue the same, unless such order, which shall recite the facts found, is revoked or suspended, such licensee shall, within the time prescribed in the order, discontinue such unjust, unreasonable, discriminatory and unfair storage charge, commission, profit, or practice. The President may, in lieu of any such unjust, unreasonable, discriminatory, and unfair storage charge, commission, profit, or practice, find what is a just, reasonable, nondiscriminatory and fair storage charge, com-

mission, profit, or practice, and in any proceeding brought in any court such order of the President shall be *prima facie* evidence. Any person who, without a license issued pursuant to this section, or whose license shall have been revoked, knowingly engages in or carries on any business for which a license is required under this section, or wilfully fails or refuses to discontinue any unjust, unreasonable, discriminatory and unfair storage charge, commission, profit, or practice, in accordance with the requirement of an order issued under this section, or any regulation prescribed under this section, shall upon conviction thereof, be punished by a fine not exceeding $5,000.00, or by imprisonment for not more than two years or both: Provided, That this section shall not apply to any farmer, gardener, cooperative association of farmers or gardeners, including live-stock farmers, or other persons with respect to the products of any farm, garden, or other land owned, leased, or cultivated by him, nor to any retailer with respect to retail business actually conducted by him. (40 Stat. C. 53, Sec. 5, page 277.)

Section 4 of the Act entitled as above was amended October 22, 1919 (Statutes United States, 66th Congress, Session 1, Chapter 80, p. 298), by providing a punishment for what had been denounced as unlawful in the original section.

(*b*) *Section Under Which Indictment was Found.*

Section 4, as amended, so far as is here material, provides:

> That it is hereby made unlawful for any person wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any

necessaries * * *. Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000.00 or be imprisoned for not more than two years, or both: Provided, That this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon land owned, leased, or cultivated by him: Provided further, That nothing in this Act shall be construed to forbid or make unlawful collective bargaining by any cooperative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased, or cultivated by them.

(*c*) *Indictment.*

In the United States District Court for the Northern Division of the Northern District of Georgia, holding sessions at Atlanta, a grand jury, on April 27, 1920, returned a bill of indictment against Plaintiff in error, Oglesby Grocery Company, charging in four counts, violations of section 4.

The allegations in all counts are substantially similar, differing only in the name of the person to whom the sale was made. The relevant allegations are:

> That Oglesby Grocery Company, a corporation, on the 13th day of April, in the year 1920, * * * during the existence of a state of war between the United States of America, and the German Government, did then and there unlawfully and wilfully make an unjust and unreasonable charge in handling and dealing in certain necessaries, to-wit: granulated sugar * * * and did make a charge of twenty cents per pound

therefor, when and while seventeen and three-fourths cents per pound then and there was a just and reasonable charge for said sugar, and any charge in excess of seventeen and three-fourths (17¾) cents per pound therefor then and there was excessive, unjust and unreasonable, the said Oglesby Grocery Company, lately theretofore having purchased the said sugar from the Savannah Sugar Refining Company at the price of sixteen cents per pound on board cars at Savannah, Georgia, and the transportation charges thereon from Savannah to Atlanta being twenty-six and nine-tenths (26.9) cents per hundred pounds.
* * *

(*d*) *Demurrer.*

A general demurrer was filed. In the discussion of this demurrer it was claimed that no crime was charged and that the Act of Congress upon which the prosecution was based was void because in conflict with the Constitution of the United States. On May 6, 1920, this demurrer was overruled and exception taken.

(*e*) *Trial, Verdict and Judgment.*

The trial began June 3, and was concluded June 8, 1920. A verdict of guilty on all four counts was rendered and a fine assessed of $2,000.00 (rec., 9). It having been contended by the defendant below that the statute on which the prosecution is based is unconstitutional and void, this appeal was taken direct from the District Court to this Court (rec., 10).

(*f*) *Facts Established.*

Defendant bought sugar which cost, f. o. b. cars Atlanta, 16.269 cents per pound; on April 13, 1920, the day the

sugar was sold it was worth in Atlanta over 24 cents a pound and that the sales of sugar were made in the name of Oglesby Grocery Company, on the date alleged, at 20 cents per pound. The evidence showed that it cost from 10 cents to 25 cents a 100 pounds to deliver the sugar from cars to warehouse, and about the same to make deliveries to retailers (rec., 51, 59). The testimony is silent as to the cost of handling this particular sugar. The sales were made on credit and deliveries were made by the seller to the retailers.

On May 21, 1920, the Department of Justice defined cost as follows:

(*g*) *Cost Defined.*

> Cost is invoice price plus freight to dealer's point, plus interest attributable to the particular purchase, plus delivery from car to warehouse, and wholesaler may make retailer come to warehouse or pay the cost of delivery therefrom, plus any other charge attributable to the particular purchase prior to its reaching wholesaler's warehouse. (Rec., 43.)

Prior to April 20, 1920, the Fair Price Committee of Georgia fixed for wholesalers a profit on sugar over invoice cost and freight of one cent a pound. On April 20th this committee, using the same basis, fixed the profit at one and a half cents. Thereafter and before May 25, 1920, the Attorney General's direction, that profits be reduced to one cent, was communicated to the Fair Price Committee in Atlanta (rec., 31). No notice was given to Plaintiff in error that either such profit was to be fixed; nor did Plaintiff in error have any hearing, nor was it consulted when either was fixed; nor was any other than newspaper notice given when profits were fixed or changed.

(h) Different Rates of Profit Fixed.

The indictment alleged, if "charge" is construed to mean price, that the profit over invoice cost and freight should be 1.481 cents a pound.

The Fair Price Committee fixed a profit over invoice cost and freight of 1.50 cents a pound.

The Department of Justice fixed a profit over invoice cost, freight, cartage, insurance, interest, delivery and other charges applicable to a particular purchase, of 1 cent a pound.

The two profits, first named above, agree as to cost but differ as to the amount; the third differs from each of the former, both as to cost and amount. Probably the profit fixed by the Department of Justice exceeds, when "cost" as defined by that Department is considered, that charged in the indictment as well as that announced by the Fair Price Committee April 20, 1920.

(i) Market Value or Cost as a Basis to Which to Add a Profit.

Proof that it was the general custom to base sales on market or replacement value was made, and the custom was admitted to exist by the District Attorney.

Plaintiff in error insisted on the trial that even if a definite profit were fixed such profit should be added to the value of its property. Sugar on April 13, 1920, was freely offered in Atlanta; but none was being allocated by the refineries. The then method by which refineries sold sugar was to ship to former customers their pro rata amount when and to the extent available, basing the allocation on

the normal purchases of such customers. On this date sugar was offered from several sources, and some was bought at wholesale at prices delivered in Atlanta, which ranged from 24 to 29 cents per pound.

Plaintiff in error contended that the market value of his sugar on April 13, 1920, exceeded 20 cents a pound, and was at least 24 cents; and that value rather than cost should be used as the figure to which should be added whatever was a reasonable rate or charge for handling or dealing in sugar. Charges embodying this contention were asked and refused and exception taken. The Court charged that the

> "Just and reasonable rate", fixed by the President through the agency of the Attorney General, and also through the agency of the Fair Price Commission,

was admitted for

> What you (the jury) think it is worth. It is not conclusive; it is not a judgment * * * * It is admitted only as *prima facie.*

(*j*) *Assigned Errors Logically Grouped.*

The assigned errors fall into four groups, as follows:

1. Those denying the right of administrative agencies to fix prices which could properly be considered in this case.

2. Errors relating to the failure to consider value in determining selling price and a like failure in submitting the issues to the jury.

3. Errors other than those already specified in admit-

ting or rejecting evidence and in giving and refusing charges.

4. Constitutional questions arising from the claim that the statute on which the indictment is based is void because in violation of the Constitution of the United States.

PART II

First Group of Errors, Price Fixing Generally.

Section 1. Statement of This Part of the Case.

(a) Price Fixing.

On the trial proof was received, over objection, of margins of profit considered by administrative agencies to be just and reasonable; requests were made to charge that the fixation of such margins was void and charges were given to the effect that margins so fixed were *prima facie* correct. The specific errors in the assignment of errors filed herein which constitute group one (rec., 10-13) are:

(b) Assignment of Errors, Group One.

1.

Because the Court erred in admitting testimony, for that during the trial of said case, counsel for the United States asked John A. Manget, a witness for the government and chairman of the Fair Price Committee for Georgia, to explain to the jury just what the plan of action of said committee was in fixing prices and what efforts were made by the committee to carry out such plan.

Counsel for the defendant in the court below, Plaintiff in error here, then and there objected to said question on the grounds that the same was immaterial and irrelevant, that no action of the Fair Price Committee was relevant or binding on the defendant, that said Fair Price Committee had no legal function to perform in relation to the issues of the case on trial and that the bill of indictment did not charge a violation of the price fixed by the Fair Price Committee.

Said objection was overruled by the Court, and the witness permitted to answer and to testify that the Fair Price Committee, after giving public notice through the newspapers, determined that it was a fair profit, prior to April 20, 1920, for wholesale grocers to receive in selling sugar 1 cent per pound in excess of the invoice cost and freight on the sugar; that on April 20th said committee increased said margin of profit to 1½ cents per pound, and that thereafter, about May 1, 1920, under direction from the Attorney General of the United States said profit was decreased to 1 cent per pound.

To the ruling of the Court in permitting said testimony, defendant in the court below, Plaintiff in error here, then and there excepted and said exception was noted and allowed and said testimony received.

2.

The Court erred in admitting testimony, for that during the trial of said case counsel for the United States asked Miss Emma T. Martin, secretary of the Fair Price Committee, a witness for the government, to read in evidence from her notes what occurred with reference to fixing a price on sugar sold by wholesale grocers.

Counsel for the defendant in the court below, Plaintiff in error here, then and there objected to said question and urged the objection that the best evidence was the minutes themselves; that the notes taken therefrom were secondary evidence; and that such testimony was incompetent, immaterial and irrelevant, because the Fair Price Committee had no authority to fix a price binding on the defendant.

Said objection was overruled by the Court, and the wit-

ness permitted to testify that the Fair Price Committee had a sub-committee on sugar, composed of a sugar broker, a retail grocer, and a wholesale grocer, which sub-committee recommended to the Fair Price Committee the price at which sugar could be sold by wholesale grocers; that said Fair Price Committee on such recommendation in October, 1919, fixed a profit of 1 cent per pound for wholesale grocers over the invoice cost and freight; that such profit remained until April 20, 1920, when the profit was fixed at 1½ cents per pound, which remained the profit until about May 1, 1920, when under order from the Department of Justice, the profit was reduced to 1 cent per pound.

To this ruling of the Court, permitting the testimony of Miss Martin, defendant in the court below, Plaintiff in error here, then and there excepted and said exception was noted and allowed.

3.

During the trial of said case, the government offered in evidence the written appointment of John A. Manget, a witness for the government, as a Fair Price Commissioner for Georgia.

Without questioning the execution of the paper constituting the appointment, counsel for defendant, Oglesby Grocery Company, then and there objected to the introduction of the certificate of appointment, because same was immaterial and irrelevant, and because the Fair Price Committee, of which said Manget was chairman, had no function under the provisions of the law under which the indictment in this case was found, the functions of said committee being limited to Section 5 of the Act of Congress of Aug. 10, 1917.

Said objection was overruled by the Court, and the certificate of appointment introduced and read to the jury.

To this ruling, counsel for defendant, Ogiesby Grocery Company, Plaintiff in error here, then and there excepted, and said exception was noted and allowed.

4.

Because the Court erred in not charging the jury, a written request therefor having been properly presented, as follows:

"Neither the so-called profit of 1 cent per pound, nor the profit of 1⅓ cents per pound, claimed by the Fair Price Committee to have been fixed as reasonable in the sale of sugar, is valid, there having been no notice to defendant, defendant not having been heard when said charge, or charges were fixed, and the committee not having considered all the elements of the cost."

5.

Because the Court erred in not charging the jury, a written request therefor having been properly presented, as follows:

"You are further charged that because in fixing such charge no consideration was given to value, the charge fixed by the committee is void."

6.

Because the Court erred in charging the jury, exception being properly taken, as follows:

"The Government says that a just and reasonable rate had been fixed by the President through the agency of the Attorney General, and also through the agency of the Fair Price Commission at Atlanta. Evidence has been introduced as to what those agencies of the President had determined to be a fair and just rate in handling sugar at wholesale. That evidence has been admitted before you for what you think it is worth. It is not conclusive; it is not a judgment; the Oglesby Grocery Company was never called before either one to have a hearing about it so that a trial could be had to fix the thing. It is admitted only as *prima facie* evidence as to what the Attorney General and the Fair Price Committee decided was just and reasonable."

7.

Because the Court erred in charging the jury, exception being properly taken, as follows:

"This Section 5 of the Act authorizes the President through such agencies to determine what is a just and reasonable profit, the language is not 'a just and reasonable rate', and it is a little different. Just and reasonable profit—that word 'profit' might have a good many significations in the minds of different people. One man might say that profit is the difference between what a commodity cost and what it is sold for. That is what I have told you that the rate and charge was. Another man might think that ought not to be considered profit but that profit is only what a man gets clear, after paying all his expenses of every sort in connection with it. Here it becomes important, therefore, in considering the finding, both of the Attorney General and the Fair Price Committee, to know what they thought profit was and in looking at all the circumstances they dealt with; you have to know

that in order to tell how much the compensation ought to be and what they found."

8.

During the trial of said case, counsel for the defendant, Oglesby Grocery Company, offered in evidence a stipulation between the Attorney for the United States in this case and defendant, that F. M. Spencer, special agent in charge representing the Department of Justice, on Aug. 28, 1919, mailed out to wholesale grocers in the State of Texas a letter, signed by himself, asking grocers to report among other things the cost of their commodities, and telling grocers that the cost price expected to be used was the market or replacement value as of the date such report was to be made.

Counsel for the Government objected to the introduction of said letter and statement and urged that the same was immaterial and irrelevant.

Which objection was sustained by the Court and the Court refused to permit the introduction of said stipulation, letter and statement.

To this ruling, counsel for the defendant, Oglesby Grocery Company, Plaintiff in error here, then and there excepted, and said exception was noted and allowed.

(c) *Summary of Errors Relating to Price Fixing.*

The errors stated in the foregoing eight divisions of the assignment of errors may be subdivided into specifications, as follows:

1. The grant of power to the President to fix prices gives no authority to determine what is a reasonable

rate or charge under Section 4 of the Food Control Act.

2. No price or margin fixed by the President or any agency by him designated can be relied on by the government in this prosecution because there was no allegation in the indictment that such price, or margin, had been fixed.

3. The uncertainty as to what was the price or margin which had been determined on by agencies of the President renders all such prices and margins void.

4. The price or margin being determined without any notice or hearing to plaintiff in error is void and to give any effect thereto in this prosecution is to deprive plaintiff in error of its rights under the Constitution of the United States.

5. The price or margin is invalid and to give effect thereto takes property for a public use without compensation, and denies plaintiff in error due process of law because the value of the property sold was disregarded.

6. The practice of the Department of Justice should have been admitted.

These several groups will be separately discussed.

SECTION 2. ARGUMENT, AND AUTHORITIES.

(a) *No Power to Fix a Rate or Charge.*

Section 5 of the Food Control Act (see provisions copied ante p. 1) gives the President power

(1) To require certain licenses to be obtained.

(2) To require reports from licensees.

(3) To determine whether or not a storage charge, a commission, a *profit*, or a practice is unjust or unreasonable.

(4) To find, when a profit is determined to be unjust or unreasonable, that the licensee shall, after reasonable notice, desist from charging such unreasonable profit and in lieu of what was condemned the President may fix what is a just and reasonable profit.

The effect of such finding is that,

(5) Such order to cease and desist is *prima facie* valid.

(6) A disobedience of such order to cease and desist shall authorize a cancellation of the license.

(7) And that a disobedience of such order and the doing of business without license shall constitute crimes.

Section 4 is unlike Section 5. Section 5 in effect creates administrative agencies with power, after hearing, to decide as to past conduct and to substitute a rule of action for the future. The decision and the rule are *prima facie* evidence.

Secion 4 makes unlawful without any administrative action any unjust or unreasonable *rate* or *charge*. Rate, charge, profit, and price are loosely used interchangeably, but here these words have distinct meanings. "Rate" and "charge" of Section 4 are used in the Interstate Commerce Act and in standard works on economics and refer to the compensation for a service. "Profit" used in Section 5 means what is left to the merchant after deducting cost of goods and cost of doing business. Price is used in Sections 4, 6, and 25, and means what is "given in exchange for a

commodity," the "expression of exchange value in terms of money." Ely, Outlines of Economics, 3rd Ed., 152.

To make Section 5 apply the Government contends that "profit" used therein means rate or charge; and to make the indictment good in the allegation that 17¾ cents per pound is a "just and reasonable charge", "charge" is construed to mean "price".

Combinations to "enhance the *price*" and to "exact excessive prices" are condemned in Section 4. The Congress in this section uses "price" and "prices" and "rate" and "charge". It is presumed that these words were used in their technical sense and the Court erred in giving one meaning to the several terms.

The original Act provided no penalty for violations of Section 4. If the learned Trial Judge was right in holding that a violation of a "profit" fixed under Section 5 is a violation of an inhibition of an unreasonable rate or charge under Section 4, there is no reason for providing an exactly similar penalty for a violation of the latter section. That the learned Trial Judge erred in his construction of Sections 4 and 5 is made apparent by the amendment to Section 4 of October 22, 1919. The Congress will not be presumed to have done a meaningless and useless thing.

The administrative agencies which the President may use have no authority whatsoever, except in cases where a particular licensee is believed to be making unreasonable profits or indulging in unjust or unreasonable practices. Section 5 is somewhat like the original Interstate Commerce Act, and the discussion by this Court in *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 509, 42 L. Ed., 243, 251, 256, 17 Sup. Ct. 896, is applicable here. It was there stated:

> It is not to be supposed that Congress would ever authorize an administrative body to establish rates without inquiry and examination; to evolve, as it were, out of its own consciousness the satisfactory solution of the difficult problem of just and reasonable rates for all the various roads in the country. And if it had intended to grant the power to establish rates, it would have said so in unmistakable terms.

If the Attorney General or the several so-called Fair Price Commissions were to have power by drawing on their consciousness alone to fix a standard of reasonableness which merchants must know at their peril, Congress surely would have said so in unmistakable language.

(*b*) *If Lawfully a Selling Price, a Profit or a Rate or Charge Could Be Fixed; To Admit Evidence Thereof the Fixation Should Be Pleaded.*

The indictment alleges that 17¾ cents is a reasonable *rate* or *charge*. This allegation, taken with the statement of cost of the sugar sold might be construed to mean that 1.481 cents per pound should be added to the invoice cost and freight to make a selling price. Literally it means that 17¾ cents added as a charge to the cost makes a reasonable selling price, and that a selling price of 34.019 cents a pound was just and reasonable. The alleged crime is a statutory one, is vaguely and indefinably defined and is one formerly unknown to our law. The rule requiring "precision and certainty" in indictments should be applied with the greatest strictness in this case. In *Ledbetter v. United States*, 170 U. S. 606, 42 L. Ed. 1162, 18 Sup. Ct. 774, citing:

United States v. Cook, 84 U. S., 17 Wall. 168, 174, 21 L. Ed., 538, 539; *United States v. Cruikshank*, 92 U. S.

542, 558, 23 L. Ed. 588, 593; *United States v. Carll*, 105 U. S. 611, 26 L. Ed. 1135; *United States v. Simmons*, 96 U. S. 360, 24 L. Ed. 819; *United States v. Hess*, 124 U. S. 483, 31 L. Ed. 516, 8 Sup. Ct. 571; *Pettibone v. United States*, 148 U. S. 197, 37 L. Ed. 419, 13 Sup. Ct. 542 and *Evans v. United States*, 153 U. S. 584, 38 L. Ed. 830, 14 Sup. Ct. 934, this Court said:

> Where the crime is a statutory one, it must be charged with precision and certainty, and every ingredient of which it is composed must be clearly and accurately set forth, and that even in the cases of misdemeanors the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the Court of the exact offense intended to be charged.

No allegation whatsoever is made as to the fixing of profit, price, rate, or charge by any agency of the President. Such an allegation is necessary.

> *United States v. Pennsylvania Central Coal Company*, 256 Fed. 703, 706; *United States v. Ford*, 263 Fed. 449.

In *Weed & Co. v. Lockwood*, —— Fed. ——, reversing same styled case, 264 Fed. 453, the Circuit Court of Appeals, speaking of orders of the President fixing prices, said:

> Such orders, if issued, would not add to the terms of an act of Congress and make conduct criminal which such laws leave untouched. (*United States v. United Verde Copper Co.*, 196 U. S. 207, 49 L. Ed. 449, 25 Sup. Ct. 222.) He can neither abridge nor enlarge the criminal responsibilities under the statute. Indeed, it is obvious that he could not fix a maximum rate of charge on wearing apparel as a foundation for

laying indictments. The statute fixes it in the terms of unjust and unreasonable rates and charges.

(c) *Differing Selling Prices Being Pleaded and Fixed, No Selling Price Is Binding.*

As stated (ante p. 6) the indictment as construed by the Court, fixes 1.481 cents and the Fair Price Committee 1.50 cents per pound over invoice price and freight as a maximum selling price; while the Department of Justice adds one cent to cost, defining cost as including items disregarded in the indictment and by the Fair Price Committee.

(d) *No Hearing Having Been Accorded Defendant in Error, No Price Fixed by an Administrative Agency Can Be Used in Any Way to Affect Its Rights Herein.*

The Court told the jury (rec., 76) and the undisputed facts show that the so-called profit fixed by the Fair Price Committee and the one fixed by the Attorney General were fixed without any notice to or hearing granted plaintiff in error.

Administrative orders are invalid for any one of the following grounds:

(1) That the order violates some provision of the Constitution of the United States; (2) That in making the order the Commission has relied on some mistake of law; (3) That the order is not included within the powers conferred by the statute upon the Commission; (4) That the order is, although in form correct, in substance so unreasonable as to violate the law; (5) That the legal effect of

undisputed testimony has been disregarded by the Commission; (6) That a full hearing was not had before the order was entered. *Interstate Commerce Commission v. Illinois Central R. Co.* 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. 155. Mr. Justice Lamar stated these grounds somewhat differently but in substance the same in *Int. Com. Com. v. Union Pac. R. Co.* 222 U. S. 541, 56 L. Ed. 308, 32 Sup. Ct. 108. See also *Florida East Coast R. Co. v. U. S.* 234 U. S. 167, 58 L. Ed. 1267, 34 Sup. Ct. 867; *Int. Com. Com. v. Louisville & N. R. Co.*, 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185; *Louisville & N. R. Co. v. U. S.*, 238 U. S. 1, 59 L. Ed. 1177, 35 Sup. Ct. 696.

In *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185, this Court, in discussing an order of the Interstate Commerce Commission, said:

> A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence and capriciously make findings by administrative fiat. Such authority, however, beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.
>
> In the comparatively few cases in which such questions have arisen it has been distinctively recognized that administrative orders, quasi-judicial in character, are void, if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the indisputable character of the evidence

> * * * *, or if the facts do not as a matter of law support the order made.

Tang Tun v. Edsell, 223 U. S. 673, 681, 56 L. Ed. 606, 32 Sup. Ct. 359; *Chin Yow v. U. S.*, 208 U. S. 8, 52 L. Ed. 369, 28 Sup. Ct. 201; *Low Wah Suey v. Backus*, 225 U. S. 460, 468, 56 L. Ed. 1165, 32 Sup. Ct. 734; *Zakonaite v. Wolf*, 226 U. S. 272, 57 L. Ed. 218, 33 Sup. Ct. 31; *United States v. B. & O. S. W. R. R.*, 226 U. S. 14, 57 L. Ed. 104, 33 Sup. Ct. 5, 9; *Atlantic C. L. R. Co. v. North Carolina Corp. Com.*, 206 U. S. 1, 51 L. Ed. 933, 27 Sup. Ct. 585; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 301, 45 L. Ed. 194, 21 Sup. Ct. 115.

(e) *A Requirement that Sugar Shall Be Sold at Less Than Its Market Value Takes Private Property for A Public Use Without Compensation.*

The evidence authorized a finding that the sugar alleged to have been sold by plaintiff in error for 20 cents a pound was worth and would have cost when sold not less than 24 cents a pound, 6¼ cents more than the price for which the Government says it should have been sold.

On April 12, 1920, according to the Fair Price Committee chairman, a witness for the United States, the price was 25¾ cents per pound (rec., 26). The sale was alleged to have been made April 13, 1920 (rec., 1). The Attorney for the Government admits that

> "Sugar was actually offered and actually sold in Atlanta to *wholesalers* at higher prices"

than 20 cents a pound (rec., 35).

Another witness testified that on April 13, 1920, the price to wholesalers was "around 25 cents at New Orleans"

(rec., 46). A lower grade sugar was offered at New Orleans on April 12, 1920, at 24 cents (rec., 35). On April 12 another witness said sugar could be bought from 24 to 25 cents and that afterwards the price went to about 28 cents (rec., 50). Mexican granulated sugar, net New Orleans, was offered April 12th at 28 cents (rec., 51). Argentine granulated on the same day was offered with banker's guarantee at 23 cents New Orleans (rec., 51, 52). On April 16 the price of Nicaragua granulated was 27½ cents f. o. b. New Orleans with an irrevocable letter of credit (rec., 56). Plaintiff in error could get no quotation from regular sources on April 12, 1920 (rec., 64, 65).

The owner of a particular commodity owns all its "value." The purchase of goods at a particular cost is evidence which may aid in determining value, but there is no necessary connection between cost and value. Jevons (Theory of Political Economy, p. 164) rejects entirely the element of cost. He says:

> "The fact is that labor once spent has no influence on the future value of any article; it is lost and gone forever. In commerce bygones are forever bygones; and we are always starting clear at each moment, judging the value of things with a view to future utility."

Cost paid, like labor spent in production, is "gone forever." Value may be less or more than cost, but value is what can not be taken for public use without compensation, and in the taking there must be due process of law.

In *New York v. Sage*, 239 U. S. 57, 61, 60 L. Ed. 143, 146, 36 Sup. Ct. 25, this Court defines value to mean

> What it fairly may be believed that a purchaser in fair market conditions would have given for it * * * *. Any rise in value before the taking * * * * is to be

> allowed, but * * * * it must be a rise in what a purchaser might be expected to give.

Ashley (English Economic History and Theory, Vol. I, Part I, Book I, Chap. III, p. 140) says:

> Value is something entirely subjective; it is what each individual cares to give for a thing.

Sedgwick (Principles of Pol. Econ., Book II, Chap. 2) says:

> Cost of production cannot be assumed to be independent of demand.

This is a correct propositon because cost of production or of buying can not determine the selling price. That price may be above or below the cost as the demand determines is a fact that economists since mediaeval times have all recognized. Even in mediaeval times "common estimation", which means much the same as "market price", was resorted to to decide what was the *justem pretium*. Cunningham (Growth of English Industry and Commerce. 5th Ed., Early and Middle Ages, pp. 253, 254) discusses the treatment of the subject by S. Thomas Aquinas and compares the canonical with the present economic theories. He says:

> The just price is known by the common estimation of what the thing is worth; it is known by public opinion as to what it is right to give for that article, under ordinary circumstances.
>
> So far we have a parallel with modern doctrine; the mediaeval "just price" was an abstract conception of what is right under ordinary circumstances—it was admittedly vague, but it was interpreted by common estimation. Modern doctrine starts with a "normal" value which is "natural" in a regime of free com-

petition; this, too, is a purely abstract conception, and in order to apply it we must look at common estimation as it is shown in the prices actually paid over a period when there was no disturbing cause.

Common estimation is thus the exponent of the natural or normal or just price according to either the mediaeval or the modern view; but whereas we rely on the "higgling of the market" as the means of bringing out what is the common estimate of any object. Mediaeval economists believed that it was possible to bring common estimation into operation beforehand, and by the consultation of experts to calculate out what was the right price. If "common estimation" was thus organized, either by the town authorities or gilds or parliament, it was possible to determine beforehand what the price should be and to lay down a rule to this effect; in modern times we can only look back on the competition prices and say by reflection what the common estimation has been.

* * * *

Prices assigned by common estimation would sometimes be high and sometimes low, according as an article was plentiful or not; the just price varied from time to time for such commodities. Nor was it unjust for a man to sell an article for more than he had paid for it as its just price, if there had been a change of circumstances.

The several margins of profit stated in the indictment, in the findings of the Fair Price Committee and in the findings of the Attorney General, all disregard present market value. Cost is made the controlling basis. Such action violates the Constitution of the United States.

Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418;

Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 91, 46 L. Ed. 92, 102, 22 Sup. Ct. Rep. 30;

Simpson v. Shepard, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729, Ann. Cas. 1916 A 18, 48 L. R. A. (N. S.) 1151;

United States ex rel. Kansas City So. Ry. Co. v. Interstate Commerce Commission, 251 U. S. 178, 64 L. Ed. ——.

On this subject District Judge Holmes in *Kennington v. Palmer*, —— Fed. ——, not yet reported, said:

> The next question is whether or not an unjust or unreasonable rate or charge has been made. In deciding this question you will not be concluded by any price or margin of profit fixed or allowed by any committee or agency of the Government, but you will take into consideration all competent evidence which may be available tending to show what is a just and reasonable charge. The test of reasonableness must be applied to all regulations and orders issued to carry out the act, and any regulation requiring the seller to disregard the real market value of the article and to sell at the original price paid therefor plus an arbitrary fixed percentage as profit is unreasonable and void, as in many cases such regulations would confiscate property rights which have become fixed and vested.
>
> You will observe, also, that Congress has not seen fit to make it an indictable offense to disregard any order or regulation of the Fair Price Committee, but has provided a penalty only for a violation of some provision of the act itself. The price that the merchant paid for his goods is not conclusive, but is a mere circumstance tending to show its present value. Although you may consider the price he paid along

with the other evidence, you should consider also, and I think should give more weight to, the replacement value of the article than to the original cost. Particularly is this true if there has been a material change in the market price of the goods. • • • • When you come to decide whether or not any price has been an unjust or unreasonable charge you will decide that by determining the fair market price of the article at the time the rate or charge is made. You will not take into consideration pre-war prices or prices at any other time. You should not speculate upon what the price of the article should be or ought to be. The question for you to determine is what in fact at the time of the sale or the effort to sell is the fair market price of the article, and has an unjust and unreasonable charge over and above the fair market price been made.

(f) The Practice of the Department of Justice Was Admissible.

As shown in error No. 8 (ante 14), an agent of the Department of Justice told wholesale grocers in Texas to use replacement value in determining what their stocks of goods were worth. This fact should have gone to the jury for consideration in deciding what was reasonable and in determining whether or not plaintiff in error acted wilfully.

PART III.

Second Group of Errors, Price Fixing.

Section 1. Statement of This Part of the Case.

(a) *Value Can Not Be Disregarded.*

The testimony of J. H. McLaurin, President of the Southern Wholesale Grocers' Association (rec., 41, 42); E. M. Hudson (rec., 44, 45), A. W. Walker (rec., 49), R. W. Davis (rec., 51), Sam Goldstein (rec., 53), Henry Y. McCord (rec., 54), and H. L. Singer (rec., 58), wholesale grocers; J. E. Raley (rec., 34) and E. E. Smith (rec., 56), brokers; Joseph A. McCord, Chairman of the Board of the Federal Reserve Bank, Atlanta (rec., 57), and of T. J. Brooke (rec., 60), a wholesale feed and produce merchant, and of J. H. Bullock (rec., 60), a retail grocer, showed that it was and always had been the custom of wholesale grocers and all other intelligent merchants to increase or decrease their selling prices as the market value of goods increased or decreased. The increase being necessary to make the business a success, and the decrease being the forced result of competition. Merchants, in order properly to serve the public, must endeavor to forecast the future and are compelled to make contracts according to their prophecies. This is speculation, or an operation based on faith in their judgment. The value to the public is in avoiding or mitigating conditions which may arise, in equalizing prices and in providing for periods of want. The equalization of prices resulting from this necessary hazard taken by the merchants means that as both rising and falling prices are encountered sales must be made with due regard to market values at the time of such sales.

(b) Testimony On This Point.

Illustrating the testimony on this point the statements of some witnesses are copied.

Mr. Manget, a witness for the United States, and the Chairman of the Georgia Fair Price Committee, said:

> I have been in the grocery business, wholesale and retail, for the larger part of 35 years—36 years (rec., 22). * * * * The general custom was when the market advanced on a commodity to try to get a little more for it; that was often done. I would not say it was universally done (rec., 26).

The District Attorney (rec., 28) said:

> Mr. Alexander:—I am perfectly willing to admit here that replacement value is the custom in cotton and in nearly everything else.

Mr. J. H. McLaurin has a wide knowledge of the grocery business and knows the custom of the trade. He said (rec., 41, 42):

> I have had occasion to learn what the custom among grocers was as to replacement value in fixing their price; that custom is and has been, the prevailing market value shall rule in fixing the selling price of a commodity; that applies to all lines of groceries. That custom generally applies throughout the country, is my impression. * * * * we recognize replacement value as fundamentally sound on any commodity we are selling; it is an economic principle that underlies all sound business.

Henry Y. McCord, a wise and conscientious wholesale

grocer, whose long experience fits him to speak (rec., 54), testified:

> I have been in the grocery business over thirty-five years. Prior to the outbreak of the European war, I was familiar with the method of doing business of the wholesale grocers in Atlanta and surrounding territory. The method with reference to fixing the price when there was a rise in the price after the goods were bought, was, if there was an advance, we advanced. If there was a decline, we declined with the market. We were forced to do that: I mean where there is a decline but not an advance, but I believe that if we did not advance we would be forced out of business. I think that with any reputable merchant with ability to do much business that was the custom. It is a necessary method of doing business. There are losses, because the prices of goods frequently go down in the wholesale grocery business. We got a car load of stuff last week that cost thirty-four cents, and we were notified that the price was twenty-nine. It is true in the wholesale grocery business that goods go up and down, and a grocer has to buy his goods sometimes ahead of the time he expects to sell them. That being true, it is necessary to go with the market, both up and down.

Mr. Joseph A. McCord, whose experience as a merchant and banker and whose eminence in the banking world give his opinions peculiar value (rec., 57), said:

> From my experience as a merchant and a banker, I am acquainted with the custom of wholesale grocers, and other lines of business, of fixing their sale prices, on the market value at the time of selling. I was acquainted with the custom which I practiced myself in my own business, and I was told what was done in

the wholesale business. I was not in the wholesale business.

The custom was this: that if they bought a shipment and had the shipment come in they based their profit largely upon that shipment. Of course if that shipment came in and in the meantime a decline should happen, they would have to reduce their price or not sell the goods. If the price advanced, they would enhance the price. I was traveling salesman for Abbott Brothers, wholesale grocers, of Atlanta, during the year 1880 and '81.

As a banker I have to keep up with credits, and the way people do business that deal with my bank. From my knowledge as a banker, that custom has been continued since I have been out of business. So far as I know, and we have that very question, because if we find that a house is not living up to good practice we generally watch their credit pretty close. If a man who did not follow that method of doing business, it would depreciate his credit rating in making discounts.

A. W. Walker (rec., 65) said:

The quotations on refined sugar, by the American Sugar Refining Company, is now twenty-two and a half cents. They offer at that price sugar till December 1st, 1920. The effect of that twenty-two and a half cent price on grocers who have bought at twenty-six, seven and eight cents is very depressing. They are facing heavy losses, from my knowledge of the grocery business.

Mr. Walker has, by subsequent events, been more than confirmed, although his statement did not fully indicate the losses which wholesale grocers have since sustained. These

grocers bought sugar as high as 28½ cents a pound and later sold the same sugar as low as 16 cents a pound.

SECTION 2. ASSIGNMENT OF ERRORS, GROUP TWO.

The specific assigned errors in this group (rec. 14, 15) are as follows:

9.

Because the Court erred in not charging the jury, a written request therefor having been properly presented, as follows:

"The Court directs you that in determining what is a just and reasonable charge to be made in handling and dealing in sugar that you must take the value of the sugar at the time the sale was made by the defendant, and if you find that the value of such sugar had increased since it was acquired by defendant, defendant is entitled to the benefit of such increase. If, therefore, you believe from the evidence that the sugar alleged to have been sold in this case was, at the time it was sold, of a market value in excess of that alleged in the indictment or if the Government has failed to prove such value, you will find the defendant not guilty."

10.

Because the Court erred in not charging the jury, a written request therefor having been properly presented, as follows:

"*Value* means what the sugar was worth in the market on the day of the sale. In determining what such value

was, you will consider offers to sell or buy and market quotations and from all the facts determine what was the present value of sugar on April 13, 1920, and the cost to defendant is not a standard of value."

11.

Because the Court erred in not charging the jury, a written request therefor having been properly presented, as follows:

"In determining whether or not the defendant sold sugar at a reasonable rate or charge, you will determine from the evidence first the market value of the sugar at the time it was sold. The fact, if you believe it to be a fact, that the sugar increased in value over what it was bought for, must be considered by you, as you cannot base your verdict solely on the freight charges and amount paid for the sugar."

12.

Because the Court erred in not defining cost and in not giving the request to charge seasonably made in writing, as follows:

"*Cost*, as used in the indictment, and as used throughout this charge means the price paid, or contracted to be paid when the sugar was bought, plus the freight paid to transport said sugar from the place where it was bought to Atlanta, Ga., plus interest on the investment in the sugar, calculated from the time the sugar was paid for until the sale thereof was made; plus the reasonable and necessary charges in removing and delivering the sugar from the car in which it was shipped to the warehouse of the Oglesby Grocery Company; plus the cost of deliver-

ing the sugar from the warehouse of Oglesby Grocery Company to the retail merchant to whom it was sold, plus any other charge attributable to the particular purchase of sugar prior to its reaching the warehouse of Oglesby Grocery Company."

13.

Because the Court erred in not charging the jury, a written request therefor having been properly presented, as follows:

"It is not sufficient evidence of the cost of the sugar for the Government to establish the price paid therefor by Oglesby Grocery Company to the Savannah Sugar Refining Company and the freight paid for transporting said sugar from Savannah to Atlanta."

SECTION 3. SUMMARY OF SECOND GROUP OF ERRORS.

The errors shown in the divisions of the assignment of errors copied next above present specific errors as follows:

(1) In not giving requested charges defining value and requiring that value should be considered in determining selling price. (Nos. 9, 10, 11, above.)

(2) In not defining cost. (Errors Nos. 12 and 13.)

SECTION 4. ARGUMENT, AND AUTHORITIES.

(a) *Value Means Worth in Exchange Whatever the Cost.*

This proposition has already been discussed (ante pp. 28-32) while considering administrative price fixing.

(*b*) *What Cost Is.*

The Department of Justice stated what it meant by cost (ante p. 5) the Chairman of the Fair Price Committee used a different definition of cost. The Court told the jury that what the *agencies* of the President did in fixing a margin over cost was *prima facie* correct. Although one of such agencies, the Department of Justice, made its ruling as to what was a reasonable profit after the sales alleged to have been made were made. One of these agencies used one set of factors to arrive at cost, another used these and several other factors; the one added 1½ cents to the factors used, the other added 1 cent to the augmented factors. The district attorney in drawing the indictment herein was probably trying to use the 1½ cent profit as the established rule but he used instead 1.481 cents.

Whether or not cost should have been defined to the jury as defined by the Department of Justice, it was the duty of the Court to give the jury an opportunity to consider the finding of that department. It is believed that the charges shown in errors 10, 11 and 12 should have been given but certainly the charges shown in errors 9 and 13 should have been given. Not to give these deprived plaintiff in error of the right to have considered material elements of a fair price.

PART IV.

THIRD GROUP OF ERRORS, RELATING TO THE TRIAL.

SECTION 1. STATEMENT OF THIS PART OF THE CASE.

The trial Court refused correctly to define "wilful," a material word used in the statute and the indictment; and the definition which was given is not full or accurate and is confusing.

Losses suffered by wholesale grocers in Atlanta at and near the time the alleged unlawful sale of sugar was made are part of the hazard of doing business, but the Court refused to permit proof of such losses on commodities other than sugar. There was no sufficient testimony to show that plaintiff in error had committed any crime.

This group of errors is assigned in subdivisions 14 to 20 (rec. 15-19) of the assignment of errors and are as follows:

SECTION 2. ASSIGNMENT OF ERRORS, GROUP THIRD.

14.

Because the Court erred in not charging the jury, a written request therefor having been properly presented, as follows:

"'Wilfully,' as used in the indictment, implies on the part of the defendant, a knowledge of the facts, and a purpose to do wrong. It means a voluntary act with a bad purpose, and without ground for believing the Act to be lawful. Before you can convict the defendant, you must

believe from the evidence beyond a reasonable doubt that the defendant knowingly without ground for believing the act to be lawful, with a bad purpose and with a purpose to do wrong, made a sale, or sales, of sugar, as alleged in the indictment."

15.

Because the Court erred in not charging the jury, a written request having been properly presented, as follows:

"If you believe that defendant's officers who sold the sugar described in the indictment acted in good faith and believed that it had the right to sell sugar at the price it was sold, you will find the defendant not guilty."

16.

Because the Court erred in not charging the jury, a written request therefor having been properly presented, as follows:

"If the evidence fails to convince you beyond a reasonable doubt that defendant acted wilfully, as 'wilfully' has been defined to you, you will find the defendant not guilty.

17.

Because the Court erred in charging the jury, exception being properly taken, as follows:

"The word 'wilful' was read to you from the statute. There has been some discussion about that. Wilful means a deliberate purpose to do the thing that was done. It means that there wasn't any mistake about it or any ac-

cident that got a man into something he did not intend. It does not mean in this connection that the defendant knew or believed that what he did was just and reasonable. If in point of fact the charge made was unjust and unreasonable, and unjust and unreasonable beyond a reasonable doubt in your opinion, and they deliberately made that charge wilfully, then there would be a wilful exaction of an unjust and unreasonable charge within the meaning of this statute. I call your attention to that meaning of the word 'wilful,' because there has been some discussion about it. Whether or not there was any accident or misfortune or misunderstanding that might render the making of an unjust and unreasonable charge not wilful under the circumstances in this case, it is for you to say, or whether the defendant did make wilfully an unjust and unreasonable rate or charge, as set out in the charge. If so they are liable to be convicted under this indictment, and if not they are not liable to be convicted, of course.

18.

Because the Court erred in excluding testimony for that during the trial of said case, counsel for the defendant, Oglesby Grocery Company, in cross-examining J. E. Raley, a witness for the Government, asked said witness if the price of salmon in Atlanta had fallen during the year 1920.

Counsel for the United States objected to said question and urged that the same was immaterial and irrelevant.

Said objection was then and there sustained by the Court, who refused to permit the witness to answer the question.

Counsel for defendant, Oglesby Grocery Company, stated that he expected to prove by the witness that the price of salmon had gone down in Atlanta since January 1, 1920, that wholesale grocers in Atlanta had been compelled to sell salmon at less than cost and had thereby lost money.

To the ruling of the Court in refusing to permit the witness to testify as stated, counsel for defendant, Oglesby Grocery Company, plaintiff in error here, excepted and said exception was noted and allowed.

19.

During the trial of said case, counsel for the defendant, Oglesby Grocery Company, offered to prove by E. M. Hudson, A. W. Walker, R. W. Davis, H. Y. McCord, H. L. Singer, Chas. I. Brannen, Jos. A. McCord, Frank Hawkins, and D. C. McClatchey, that wholesale grocers in Atlanta had during the months of March, April and May, 1920, lost money on canned fish, cheese, lard, lard compounds, and other commodities, because the price of said commodities had gone down after their purchase by wholesale grocers.

Counsel for the United States then and there objected to said question as to each of said witnesses, because the same was immaterial and irrelevant.

Counsel for defendant, Oglesby Grocery Company, stated that he expected to prove by each of said named witnesses that during the months of March, April and May, 1920, the prices of the named commodities had gone down; that grocers had to go down with the market, selling at less than cost, and had, therefore lost money.

The Court ruled that the objection was good and declined to permit the introduction of the testimony.

To this ruling counsel for Oglesby Grocery Company, plaintiff in error here, then and there excepted and said exception was noted and allowed.

20.

Because the Court erred in not granting the motion to direct a verdict for the defendant below, plaintiff in error here, on the ground of the written motion seasonably filed, asking such direction, because there was no legal testimony showing the commission of any crime.

SECTION 3. ARGUMENT AND AUTHORITIES, THIRD GROUP OF ERRORS.

Wilfully.

The statute requires that the act be done wilfully, the pleader followed the statute in the indictment.

By written request set out in error No. 14, copied above, plaintiff in error asked that wilfully be defined.

The definition asked is derived from that used in:

King v. State, 103 Ga. 263, 265;

Felton v. United States, 96 U. S. 699, 703, 24 L. Ed. 875;

Spurr v. United States, 174 U. S. 728, 736; 43 L. Ed. 1150, 1153, 19 Sup. Ct. 812.

Request was also made (errors Nos. 15, 16, *supra*) to charge that if the sale was made in "good faith" and under the belief that the right existed to "sell sugar at the price it was sold", or if proof failed to establish wilful

action, there should be a verdict of not guilty. These charges being refused, the Court (error No. 17, *supra*) gave a confused definition of wilful, but said, as nearly as a definite meaning can be gathered from the language used, that if the charge or selling price was made without mistake or accident, was knowingly made, was unjust and that plaintiff in error "deliberately made that charge *wilfully*", the act would be "wilful". The Court seems to mean that if there was no accident or mistake, the act was wilful. Some person in the name of Oglesby Grocery Company did knowingly and deliberately sell sugar at 20 cents a pound, which, according to the language of the Trial Judge, made the act wilful. The Court misses the point. Knowingly and deliberately to sell is not the same as knowingly and deliberately to sell at an unreasonable charge. It was thought the sale was made at a reasonable rate or charge. That issue the Court's charge excluded from the consideration of the jury.

Merchants traveling through an uncharted and pathless economic field should not be punished for an innocent and unintended error in judgment. With no standard to guide, the jury is given a roving commission to seek the goal, "just and reasonable;" and if the goal found happens to be different from the one the merchant in an honest effort finds, the merchant, who knowingly acts on what he finds, is, according to the charge, a criminal.

Were the things which constitute the crime known, the doing of those things deliberately and knowingly might be wilful; when both the acts and the consequences are unknown and unknowable prior to a decision by a jury, to constitute wilfulness, there must be something more than is included in the definition of the trial judge.

Plaintiff in error was presumed to know the law, but was not presumed to know what was just and reasonable.

In the realm of ethics there are wide differences of opinion. With unanimity so far as this record shows merchants believe and have always believed and practiced the principle that it is just and reasonable to sell their goods for value. Courts have approved the same principle. Plaintiff in error took that price for its property which it believed was its right. This is not a mistake of law. The rule applicable was stated by Coleridge, Judge, in *Reg. v. Reed*, C. & M. 306, 307, 41 E. C. L. 170, as follows:

> Ignorance of the law cannot excuse any person; but at the same time, when the question is, with what intent a person takes, we cannot help looking into their state of mind; as, if a person takes what he believes to be his own, it is impossible to say that he is guilty of felony.

Whoever sold this sugar in the name of Oglesby Grocery Company followed what was the custom in the business in which that Company was engaged. There was no deviation from "what is usual," from the "normal and customary course," or from the usual and established scale of charges and prices. (These quotations are from the trial judge's opinion in this case, record bottom of page 7 and top of page 8.) Such sale was made in conformity with the stronger rule of the canonists, the "common estimation" of what was just and reasonable (ante p. 25). The rule uniformly adopted by this Court that value means "present value," was obeyed. The Court's charge denied plaintiff in error the right to have custom, the trial Judge's own rule, common estimation, and the law announced by this Court, considered in deciding whether or not there was a wilful act.

(b) *Losses on Commodities Other Than Sugar.*

The wholesale grocery business of plaintiff in error is

an entity and is so treated by the Department of Justice and the Fair Price Committee because each of those agencies denies any consideration to overhead expenses and general losses. What is a reasonable charge for a particular service or a reasonable price for one commodity sold with many others can only be known by considering the business as a whole. Even when all the business is considered it is very difficult to fix a reasonable rate or charge on a single article or for one service.

> *Atlantic C. L. R. Co. v. Florida*, 203 U. S. 256, 51 L. Ed. 174, 27 Sup Ct. 108.

With an admittedly difficult problem, with no legislative standard to guide, with a wide and uncontrolled discretion in a jury, any light, even a dim one, should be permitted the jury and evidence of general losses should have been received. If a wholesale grocer can not from all his business pay operating expenses and some return on investment, he will refuse longer to serve the public; if he loses because some commodities have gone down in price, he must, and justly and reasonably should, fairly compensate himself in selling those commodities the prices of which have advanced.

Even the stricter rule of the canonists of the 13th century recognized that there should be remuneration for the hazards of business. Cunningham (Growth of English Industry and Commerce, Early and Middle Ages, Part II, Section 84, p. 255) says:

> Mercantile dealings were for the common good of mankind and must be carried on, despite the possible danger. Commerce might be carried on for the public good and rewarded by gain, and it was only sinful if it was conducted simply and solely for the sake of gain. The ecclesiastic who regarded the merchant as exposed to temptations in all his dealings, would not

> condemn him as sinful unless it was clear that a transaction was entered on solely from greed, and hence it was the tendency for moralists to draw additional distinctions, and refuse to pronounce against business practices where common sense did not give the benefit of the doubt. Remuneration for undertaking risk was at first prohibited but the later canonists refused to condemn it.

This Court judicially knows that a partial restriction of the amount of money in circulation and a limitation on the use of money by the Federal Reserve Bank System, aided perhaps by other causes, has resulted in a general fall in prices since January, 1920. Such a result may be beneficial, it is not here material to discuss that issue; but beneficial or not, wholesale grocers who must buy ahead of actual sales to retailers have lost heavily on sugar and on other commodities. This necessarily is true in rapidly falling markets, and the only way a merchant can remain in business is by making a fair average profit. This he can do only by taking advantage of rising prices to offset losses on falling prices.

(c) *Not Shown that the Sales Alleged to Have Been Made Were Made by Competent Authority.*

The indictment alleged that Oglesby Grocery Company was a corporation. The record (p. 22) shows that W. A. Albright was president of that company, and that as president he bought the sugar alleged to have been sold. The evidence further shows that he sold sugar at 20 cents a pound (rec. 22) of the same description as that bought for 16.269 cents. There is no testimony as to who fixed the selling price, or who authorized such sales. Mr. Manget testified that W. A. Albright told the witness that the rulings of the Fair Price Committee would be dis-

regarded (rec. 22). What authority or duties W. A. Albright, president, had was not shown. While this Court has held that a corporation may commit a crime, that holding was made in a case where there was testimony and admissions showing definitely that the act charged was performed

> within the scope of the authority and employment of the agents of the company.
>
> *New York C. & H. R. Co. v. United States*, 212 U. S. 481, 494, 53 L. Ed. 613, 622, 29 Sup. Ct. 304.

Section 23 of the Food Control Act, under which this plaintiff in error is indicted, for a violation of section 4 thereof, reads:

> The word "person", wherever used in this Act, shall include individuals, partnerships, associations, and corporations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any official, agent, or other person acting for or employed by any partnership, association, or corporation, *within the scope of his employment or office*, shall, in every case, also be deemed the act, omission, or failure of such partnership, association, or corporation as well as that of the person.

Is it the law that "President" connotes the power to fix selling prices?

PART V.

Fourth Group of Errors, Constitutional Questions.

Section 1. Statement of This Part of Case.

By demurrer and by motion to direct a verdict, it was contended in the Court below that the statute under which this indictment was found is unconstitutional and void. Detailed specifications in support of such contentions were made and exceptions reserved (rec. 71, 72) and such specifications appear in the assignment of errors. (Rec. 17, 18.)

Section 2. Assignment of Errors, Group Four.

Errors 21, 22 and 23 of the assignment are directed to this issue and are:

21.

Said Court erred in not sustaining the demurrer to the indictment filed by Oglesby Grocery Company, plaintiff in error, the law on which said indictment is based being void, because in conflict with the Constitution of the United States.

22.

Said Court erred in not directing a verdict for defendant, a motion in writing having been made, prior to the argument before the jury and prior to the submission of the same to the jury, asking that such direction be given

because Section 4 of the Act of August 10, 1917, as amended by the Act of October 22, 1919, the statute under which the indictment in this case was found and prosecuted, is unconstitutional and void and in conflict with the Constitution of the United States.

23.

The Court erred in not directing a verdict for the defendant below, plaintiff in error here, a written request having been seasonably made, and in submitting the issue to a jury; because the law under which the prosecution was had, violates the Constitution of the United States in the following particulars, to-wit:

(a) Conditions existing on April 13, 1920, did not justify the employment of the war powers of the Constitution.

(b) The Act is an unconstitutional attempt to delegate the legislative powers of Congress.

(c) The Government in the indictment and on hearing relies on a price fixed by an alleged Government agency, and as no hearing was had, fixing said price, and the law and facts were disregarded in fixing such price, the defendant is denied due process of law, and the equal protection of the law.

(d) Said law is in violation of Paragraph 1 of Section 2 of Article 4 of the Constitution of the United States, in that it denies to citizens of one State privileges and immunities granted to citizens of other States.

(e) Said statute is void, in violation of Paragraph 1 of Section 2 of Article 4 of the Constitution of the United States for that the statute, as administered, denies the equal protection of the laws, and is not uniform in its application throughout the several States of the Union.

(f) The statute under which this indictment is found is void in violation of the due process clause of the fifth amendment to the Constitution in that it does not operate on all alike and is so wanting in a basis for classification as to produce such a gross and patent inequality as inevitably leads to a denial of due process to the defendant below, Plaintiff in error here.

(g) Said statute is void, because in violation of Article 5 of the amendments to the Constitution of the United States and deprives defendant below, plaintiff in error here, of its property without due process of law, and takes its property for public use without any and without just compensation.

(h) Said statute deprives persons of property and takes property without just compensation, for that the value of such property is not considered, and only the cost thereof is taken as a measure of value, and thus violates Article 5 of the amendments to the Constitution of the United States.

(i) Said statute is void and in violation of Article 5 of the amendments to the Constitution, in that it seeks to take a citizen's liberty and property without due process of law and indictments thereunder are void in charging an offense without adequately defining the offense.

(j) Said statute and the indictment drawn thereunder violate the sixth amendment to the Constitution of the United States for that neither informs defendant "of the nature and cause of the accusation."

(k) Said statute is unconstitutional and void, because a judicial determination of what is a reasonable price is "beset by such deterrents," as to deprive defendant of its constitutional right to due and equal process of law.

Section 3. Summary of Contentions Relating to the Constitution.

The specific contentions as to the constitutional provisions violated by the Act relied on by the Government may be briefly stated as follows:

(1) The conditions calling into force the war powers of Congress, latent in times of peace, did not exist at the time the crime was charged to have been committed.

(2) The statute is an attempted delegation by the Congress of its legislative powers.

(3) Equal privileges and immunities are denied.

(4) Private property is taken for public use without just compensation, or due process of law.

(5) Neither the statute nor the indictment informed accused of the nature and cause of the accusation.

(6) The uncertainty of the meaning of the statute and the penalties which an error might entail beset an accused with such dangers in exercising the right to due process of law as to deprive plaintiff in error of that right.

These several specifications are related and except the first, although in somewhat varying degrees, rest upon the fact that the statute is vague, indefinite and uncertain.

Section 4. Brief of Argument, Group Five of Errors.

Individual discussion of each specification will follow, but preliminary thereto a brief historical sketch of some former attempts to regulate rates, charges and practices will not be without value.

(a) *History of Regulation of Business.*

(1) *General History.*

Augustine, in the third century, argued for a *justum pretium*, but his statements were moral and religious and enforcible only by religious sanctions, and the pious author recognized the moral and religious right to sell a thing for its "worth." Ashley Economic History, Vol. 1. Part 1, p. 134. At that time and before, the Roman law left the fixation of prices to the "higgling of the market." Justinian Digest IV, iv, 16 (4) xix, ii 22 (3). Maine, Ancient Law, 261.

Later, S. Thomas Aquinas, as well as the other canonists, contended for a just price, but gave no definition thereof.

England for centuries attempted to regulate trade. There were assizes of wages, of beer, and of bread. These as to beer and bread dealt principally with standards of measurement, with weight and with quality, although prices were assized or fixed. There was nothing indefinite as to the price of commodities or the rate of wages; and, however despotic the King was, there was opportunity for the trader or wage earner to be heard.

Usually prices were fixed by the interested Gild by the clerks of the market, the justices of the peace or by the mayor and common council, all except the gilds being aided by special juries who were acting under specific statutory power, authorizing the holding of hearings and the fixing of prices and wages. In all cases there was some hearing and the price fixers had or obtained some definite knowledge of the facts constituting a reasonable price, and a definite price was named.

The statute of 1534

> gave powers for settling the price of victuals by authority. (Cunningham Growth of English Industry and Commerce, Modern Times, Part 1, Sec. 173, p. 92.

By proclamation in 1618 the King directed the

> "Clerke of Our Market" to "set reasonable and indifferent (non-discriminatory) rates and prises upon victuals and other provisions."

The times and place of holding the Court were fixed by the proclamation and the "Clerke of Our Market" was directed to make his inquiry

> by the oath of twelve men at the least to be impanelled. (id. pp. 94, 95.)

A form used by the justices of the peace is quoted by Cunningham (id. part 2, pp. 887, 888) showing how wages were rated in the seventeenth century. This in part reads:

> At the general quarter sessions of the Peace, of our Sovereign Lord the King, held for the County of Middlesex at Westminister in the said county, upon ---------- next after the Feast of Easter (to-wit) the ---------- day of ---------- in the ---------- year of the reign of our Sovereign Lord Charles the Second, by the Grace of God, King of England, Scotland, France, and Ireland, Defender of the Faith, etc., the ---------- The rates of servants wages, labourers, workmen and artificers (in pursuance of the Statute of the Fifth of Queen Elizabeth, in that behalf made and provided) are rated and assessed by the Justice of the Peace of the said county

at the said sessions assembled (calling to their assistance some others of the discreet inhabitant of the said county) as hereafter followeth:

And it is ordered by the said justices, that the sheriff of the said county shall cause the said rates to be proclaimed and published according to the statute in that case also made and provided; and that after such proclamation and publication made of the said rates, that no person whatsoever (which may be therein concerned) shall (this present year) presume to give, allow, demand, receive, or take any greater wages than such as are mentioned in the said rates; neither shall any master, or mistress, entertain or put away any servant, workman, or labourer; neither shall any servant, workman, or labourer, depart from any master or mistress, which may be mentioned or intended in the said Statute of the Fifth of Queen Elizabeth or any other statute in that behalf provided, without due observation of the said statutes, under such pains and penalties as are therein respectively mentioned.

Prices were arrived at in a similar way, except the Gild of merchants affected was usually called on to determine what the prices should be.

So far as investigation shows, the statement is justified that there was always a hearing, a definite rate or price fixed and a public proclamation thereof.

In this case there was no hearing and no proclamation of what had been fixed, and from the indictment it seems the district attorney himself did not know what profit had been fixed or what cost meant.

Some of the district judges in seeking reasons to sus-

tain the Food Control Act, have used the analogy of the common law and statutory crimes of engrossing, forestalling and regrating. These were not price fixing regulations, although their purpose, like our anti-trust statutes, was to prevent unfair prices.

"Engrossing" meant buying with intent to resell and was made a crime in order to prevent the small farmer or craftsman from selling to a middleman who might engross or monopolize the commodity. "Forestalling" meant to go out and meet the seller before he reached the market and buy his goods or dissuade him from coming to the market, the effect of forestalling being similar to that of engrossing. "Regrating" was a lesser form of engrossing; engrossing being wholesaling, and regrating, retailing. The regrator could not sell in the same market or within four miles thereof. These laws were for the protection of both seller and purchaser.

George 3. C. 71 repealed some of these statutes.

> As being detrimental to the supply of the laboring and manufacturing poor of the Kingdom;

and by 7 and 8 Victoria, C. 24, both the common law and the statutory offenses were abolished. Bishop Criminal Law, Vol. 1, Secs. 518 (2), 524 (1).

(2) *Federal Regulation.*

The outstanding illustration of rate fixing, there has, prior to Food Control Act, been no price fixing by Congress, is the Interstate Commerce Act. The language of Section 4 of the Food Control Act (ante 2, 3) is similar to the Commerce Act. In the Commerce Act "all charges * * * * shall be just and reasonable" (section 1) "unjust discrimination" is prohibited (section 2) and "any

undue or unreasonable preference or advantage" is made unlawful (section 3). The Commerce Act provides adequate machinery for notice and hearing before the Commission and for a review before the Courts. The Act is valid but its enforcement must be in harmony with constitutional requirements. (See discussion under the contention that a hearing must precede price fixing (ante 20-22).

(3) *State Regulation.*

The history of the regulation of charges in the United States can to a large extent be gathered from the decisions of this Court. The Granger cases (1) mark the first general step. These cases are based on the principle as stated in the Munn case, p. 130, that "when private property is devoted to a public use it is subject to public regulation." Illustrating the principle Lord Ellenborough (Munn Case 127, 128) is quoted to the effect:

> There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms.

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(1) Granger Cases—

Munn v. Illinois, 94 U. S. (4 Otto) 113, 24 L. Ed. 77; Chicago, B. & Q. R. Co. v. Iowa (v. Cutts), 94 U. S. 155, 24 L. Ed. 94; Peik v. Chicago & N. W. R. Co., 94 U. S. 164, 24 L. Ed. 97; Chicago, M. & St. P. R. Co. v. Ackley, 94 U. S. 179, 24 L. Ed. 99; Winona & St. Paul R. Co. v. Blake, 94 U. S. 180, 24 L. Ed. 99; Stone v. Wisconsin, 94 U. S. 181, 24 L. Ed. 102.

Mr. Justice Field did not concur in the conclusion in this case, and in an *argumentum reductio ad absurdum*, said:

> I deny the power of any Legislature under our government to fix the price which one shall receive for his property of any kind. If the power can be exercised as to one article, it may as in all articles, and the prices of everything from a calico gown to a city mansion may be the subject of legislative direction.

The decisions in the Railroad Commission Cases, (2) *Dow v. Beidelman* of 1888, the Minnesota Case of 1890, the Texas Commission Case of 1894, the Turnpike Case of 1896, *Smyth v. Ames* in 1898, the National City Case in 1899, the Water Rate Cases of 1903, the Water and Gas Cases of 1909, and the several cases reaching the Supreme Court in 1913 (3) are corollaries of the Granger Cases.

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(2) Railroad Commission Cases—

Stone v. Farmers' Loan & Trust Co., 116 U. S. 307, 29 L. Ed. 636, 6 Sup. Ct. 334, 1191; Stone v. Ill. Cent. R. Co., 116 U. S. 347, 29 L. Ed. 650, 6 Sup. Ct. 348, 1191; Stone v. New Orleans & N. E. R. Co., 116 U. S. 352, 29 L. Ed. 651, 6 Sup. Ct. 349, 391.

(3)—

Dow v. Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 Sup. Ct. 1028.

Chicago, M. & St. Paul R. Co. v. Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462.

Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047.

Covington & L. Turnpike R. Co. v. Sandford, 164 U. S. 578, 41 L. Ed. 560, 17 Sup. Ct. 198.

Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418.

San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804.

Knoxville Water Co. v. Knoxville, 189 U. S. 434, 47 L. Ed. 887, 23 Sup. Ct. 531; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571.

Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. 30, probably enlarges the territory over which regulation theretofore had been extended, but provides restrictions on that regulation not necessary in regulating common carriers and monopolies. Fair returns on present value is required by the decision in the Stock Yards Case, and the Court classified those who might be regulated into two groups, (1) Where "the owner has intentionally devoted his property to the discharge of a public service", and (2) where the owner "has placed his property in such a position that the public has become interested in its use". The Court said:

> In reference to this latter class of cases, which is alone the subject of present inquiry, it must be noticed that the individual is not doing the work of

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Knoxville v. Knoxville Water Co., 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. 148; Wilcox v. Consolidated Gas Co., 212 U. S. 19, 53 L. Ed. 382, 29 Sup. Ct. 192. Other illustrative cases are:

Budd v. New York, 143 U. S. 517, 36 L. Ed. 247, 4 I. C. R. 45, 12 Sup. Ct. 468; Brass v. North Dakota ex rel. Stoesser, 153 U. S. 391, 38 L. Ed. 757, 4 I. C. R. 670, 14 Sup. Ct. 857; People v. Budd, 117 N. Y. 1, 5 L. R. A. 559, 22 N. E. 670; Lake Shore & M. S. R. Co. v. Cincinnati S. & C. R. Co., 39 Ohio St. 604; State ex rel. Attorney General v. Columbus Gaslight & Coke Co., 34 Ohio St. 572, 32 Am. Rep. 390; Davis v. State, 68 Ala. 58, 44 Am. Rep. 128; Baker v. State, 54 Wis. 368, 12 N. W. 12; Nash v. Page, 80 Ky. 539, 44 Am. Rep. 490; Girard Point Storage Co. v. Southwalk Foundry Co., 105 Pa. 248; Sawyer v. Davis, 136 Mass. 239, 49 Am. Rep. 27; Brockbill v. Randall, 102 Ind. 528, 52 Am. Rep. 695, 1 N. E. 362; Delaware, L. & W. R. Co. v. Central Stockyard & Transit Co., 45 N. J. Eq. 50, 6 L. R. A. 855, 17 Atl. 146; Spring Valley Water-Works v. Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. 48; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 Sup. Ct. 400; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. 484; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. Ed. 417, 20 Sup. Ct. 336; Atlantic C. L. R. Co. v. North Carolina Corp. Com., 206 U. S. 1, 51 L. Ed. 933, 27 Sup. Ct. 585, 11 Ann. Cas. 398.

> the State. He is not using his property in the discharge of a purely public service. He acquires from the State none of its governmental powers. His business in all matters of purchase and sale is subject to the ordinary conditions of the market and the freedom of contract. He can force no one to sell to him, he cannot prescribe the price which he shall pay. He must deal in the market as others deal, buying only when he can buy and at the price at which the owner is willing to sell, and selling only when he can find a purchaser and at the price which the latter is willing to pay. If under such circumstances he is bound by all the conditions of ordinary mercantile transactions he may justly claim some of the privileges which attach to those engaged in such transactions. And while by the decisions heretofore referred to he cannot claim immunity from all state regulation he may rightfully say that such regulation shall not operate to deprive him of the ordinary privilege of others engaged in mercantile business.

In *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. Ed. 1011, 34 Sup. Ct. 612, a majority of this Court, it has been claimed, enlarged the field of regulation, but if so there was an express limitation "to the regulation of the insurance", (p. 415) and the Court distinguished between that business and ordinary commercial transactions. The Court (p. 414) said: "It (insurance business) is therefore essentially different from ordinary commercial transactions". And further (p. 416):

> We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is

> powerless to oppose, and which, therefore, has led to the assertion that the business of insurance is of monopolistic character.

If, as indicated in this quotation, monopoly is the basis for the regulation of insurance companies, the case does not enlarge the field of regulation.

It will also be noted that in the German Alliance Insurance case the statute involved gave ample opportunity for a hearing and a definite fixation of price.

A general statement of State statutes regulating public service corporations is given by this Court in *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896.

(*b*) *Summary of the Principles of Federal and State Regulations of Business.*

In the cases cited above showing the history of regulation the power to regulate was based on the commerce clause, giving power to Congress or the police powers of the states; but however based, the exercise of the power must be had conformably to constitutional requirements.

Generally, State statutes, like those of the Federal Government and of England, recognized the principle that such power could not be arbitrarily exercised, but that constitutional *methods* must be followed. There are three outstanding instances where such recognition was not had; and, as a consequence, the statutes were not enforced. These cases are:

> *Louisville & N. R. Co. v. Railroad Commission of Tennessee*, 19 Fed. 679;

Chicago & N. W. Ry. Co. v. Dey, 35 Fed. 866, 1 L. R. A. 744, 2 Int. Com. Rep. 584;

Louisville & N. R. R. Co. v. Commonwealth of Kentucky, 98 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457.

In the first of these cases the statute was essentially similar to Section 4 of the Act involved in the instant case. In a learned and able opinion that statute was held void. The decision met the approval of this Court, and, as indicated by the then Chief Justice, not unlikely served as a warning to other State Legislatures in framing regulatory statutes.

Stone v. Farmers' Loan & Trust Co., 116 U. S. 307, 336, 29 L. Ed. 636, 646, 6 Sup. Ct. 334.

In the second case, Circuit Judge, later Mr. Justice Brewer, cited text writers and cases sustaining the principle that criminal statutes must not be "cunningly and darkly penned."

The third case is one decided by the Supreme Court of Kentucky. A Kentucky statute making criminal a charge of "more than just and reasonable" was held invalid; and the Court said:

> No case can be found, we believe, where such indefinite legislation has been upheld by any court when a crime is sought to be imputed to the accused.

These wholesome decisions, and the similar cases of *United States v. Capital Traction Co.*, 34 App. D. C. 592, 19 Ann. Cas. 68; *Czarra v. Board of Supervisors*, 25 App. D. C. 443; *Ex Parte Jackson*, 45 Ark. 158, and *United States v. Tozer*, 52 Fed. 917, had their effect, and little such legislation as was condemned therein has been en-

acted. The Georgia Legislature disregarded these decisions, and a statute making it a crime to operate an automobile at an unreasonable rate of speed was held void.

Hayes v. State, 11 Ga. App. 371, 75 S. E. 523;
Empire Life Ins. Co. v. Allen, 141 Ga. 413, 81 S. E. 120;
Strickland v. Whatley, 142 Ga. 802.

(c) *The Statute Here Discussed Is Invalid Even if the Congress Had Power to Fix Prices.*

There is ample authority to support a contention that ordinary mercantile transactions are free from governmental regulation and that individuals engaged in such transactions have liberty to fix their prices at such standard as may be permitted by open competition and the "higgling of the market." Such a contention is made in the assignment of errors and is supported by the cases already cited. However, even if Congress had the power, by a definite statute providing for an adequate hearing, to regulate prices, such power was not exercised in the Food Control Act. The subsequent discussion therefore will be directed to the unconstitutional exercise of the claimed power.

SECTION 5. THE WAR ENDED PRIOR TO APRIL 13, 1920.

(a) *Principles of Law Applicable.*

In *Hamilton v. Kentucky Distilling Co.*, 251 U. S. 146, 64 L. Ed. ——, this Court proceeded on the assumption that the war power of Congress might end prior to a proclamation of peace. As reasons why that principle should not then be applied the Court mentioned that:

(1) The treaty of peace had not been concluded.

(2) That the railroads were still under National control.

(3) That other war activities had not been brought to a close.

(4) That the man power of the nation had not been restored to a peace footing.

Only one, the first, of these reasons existed April 13, 1920.

The opinion in the Kentucky Distilling case was rendered December 15, 1919, and the executive acts there relied on to show a termination of the war were dated November 18, 1919, or prior thereto.

On February 28, 1920, the railroads were restored to their owners, and prior to April 13, 1920, war activities had ceased and the Army and Navy were on a peace footing. The German and Austrian-Hungarian Empires had ceased to exist and the only reason why a peace proclamation had not been made was because the Executive and the Senate could not agree as to the form which a peace treaty should take. The successors to our former enemy governments had signed peace treaties and the treaties were functioning.

In the "absence of *more certain criteria* of equally general application", a proclamation terminating a war will be accepted. *Freeborn v. The Protector*, 12 Wall. 700, 20 L. Ed. 463.

Applicable to the Food Control Act, the President has, by several proclamations, shown in effect that the war power of Congress was no longer available.

(*b*) *Proclamations of the President.*

1919.

March 19, 1919, pp 1, 2, licenses for "distributing fresh, canned, or cured beef, pork or mutton or lard and all regulations under the same are cancelled.

May 31, 1919, pp. 9, 10, hereafter licenses unnecessary for dealers in cotton seed oil, cotton seed meal, etc., *lard substitutes* and all other cotton seed products.

June, 1919, pp. 16, 17, a similar proclamation as to rice and rice flour.

November 21, 1919, pp. 33, 34, prohibition of importing and exporting wheat and wheat flour discontinued and cancelled.

July 31, 1919, p. 25, the President, referring to rules and regulations governing flying by air craft, said:

> The necessity as a war measure for the continuance and effect of such rules and regulations has come to an end.

On March 23, 1920, coal was released from the fuel provision of the Act of August 10, 1917.

SECTION 6. ADMINISTRATIVE AGENCIES ARE GIVEN LEGISLATIVE POWERS.

Statement.

That Congress having prescribed rules, may delegate to a Commission the ascertainment of facts, is not questioned. The chief example of such legislation is the Interstate Commerce Act. By an unbroken line of authorities from

the times of Lord Hale to the present, it has been required that in regulating rates and charges there must be a fair return on actual present value. This principle governs all administrative agencies. Here there is no fixed principle. Some courts and some administrative agencies have adopted the rule that present market value is the basis. In this case cost was the basis. Judge Pollock, in *United States v. Robinson*, decided June 12, 1920, not yet reported, held that an indictment which failed to state replacement or market value was void whether or not the Food Control Act was constitutional. Judge Pollock said:

> All that is here charged against defendants is a conspiracy to charge excessive prices for the necessary commodities by them sold. What constitutes this excessive price is no where defined, stated or charged. What the market price of the necessary commodity was at the time is not stated or charged. What the true or intrinsic value of this necessary food product in comparison with other necessary food commodities is not stated. In certain of the cases at least defendants are charged as wholesale merchants dealing or trading in this necessary food product at wholesale, in which event, to remain in such business, of necessity, they must continue to replace the stock of this community as exhausted by sales, yet, in no manner or way is such replacement cost or value stated."

Judge Edwin R. Holmes, in *Kennington v. Palmer*, May 8, 1920, not yet reported, said:

> The next question is whether or not an unjust or unreasonable rate or charge has been made. In deciding this question you will not be concluded by any price or margin of profit fixed or allowed by any committee or agency of the Government, but you will take

into consideration all competent evidence which may be available tending to show what is a just and reasonable charge. The test of reasonableness must be applied to all regulations and orders issued to carry out the act, and any regulation requiring the seller to disregard the *real market value* of the article and to sell at the original price paid therefor plus an arbitrary fixed percentage as profit is unreasonable and void, as in many cases such regulations would confiscate property rights which have become fixed and vested.

You will observe also that Congress has not seen fit to make it an indictable offense to disregard any order or regulation of the Fair Price Committee, but has provided a penalty only for a violation of some provision of the act itself. The price that the merchant paid for his goods is not conclusive, but is a mere circumstance tending to show its present value. Although you may consider the price he paid along with the other evidence, you should consider also, and I think should *give more weight to* the replacement value of the article than to the original cost. Particularly is this true if there has been a material change in the market price of the goods. (Italics supplied.)

In this case the Department of Justice and the Fair Price Committee each fixed an arbitrary price over cost, the prices being different, and cost was differently defined. The trial judge (rec. 76) told the jury:

The Government says that a just and reasonable rate had been fixed by the President through the agency of the Attorney General and also through the agency of the Fair Price Commission at Atlanta. Evidence has been introduced as to what these agencies of the President had determined to be a

fair and just rate in handling sugar at wholesale. That evidence has been admitted before you for what you think it is worth. It is not conclusive; it is not a judgment; the Oglesby Grocery Company was never called before either one to have a hearing about it so that a trial could be had to fix the thing. It is admitted only as *prima facie* evidence as to what the Attorney General and the Fair Price Commission decided was just and reasonable.

(*b*) *Argument and Authorities.*

The Food Control Act, as construed in the lower court, violates every principle of constitutional right. In *Yick Wo. v. Hopkins*, 118 U. S. 356-374, 30 L. Ed. 220, 225, 227, 6 Sup. Ct. 1064, this Court said:

> The fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to man the blessings of civilization, under the reign of just and equal laws, so that in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth "may be government of laws and not of men." For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

The Court then quoted from *Baltimore v. Radecke*, 49 Md. 217, as follows:

> It commits to the unrestrained will of a single pub-

> lic officer the power to notify every person who now employs a steam engine in the prosecution of any business in the City of Baltimore to cease to do so, and by providing compulsory fines for every day's disobedience of such notice and order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action. It lays down no rules by which its impartial execution can be secured, or partiality and oppression prevented. It is clear that giving and enforcing these notices may and quite likely will, bring ruin to the business of those against whom they are directed, while others, from whom they are withheld, may be actually benefitted by what is thus done to their neighbors; and, when we remember that this action, or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to everyone who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void.

This Court, following the quoted language from the Maryland Court, *supra*, said:

> Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust

and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

In *United States v. Eaton*, 144 U. S. 677, 36 L. Ed. 591, 594, 12 Sup Ct. 764, this Court said:

> It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient.

And further the Court said:

> Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense.

See also Part II, Section 2, Subdivision (e) (ante 22-27).

Section 7. Equal Privileges and Immunities Are Denied.

(a) *Statement of This Part of the Case.*

The statute sections 4 and 5 excepts farmers and others from its operation.

The President (ante 62) has excepted such neces-

sities as meat, lard compounds made from cotton seed oil, rice and flour.

An agent for the Department of Justice in Texas as shown by a declaration not admitted to the jury (rec. 40) specifically authorized the use of replacement value. The latest invoice and not cost controls the War Department's selling prices (rec. 40) Judge Holmes in Mississippi (ante 63, 64), Judge Lewis in Colorado, and Judge Pollock in Oklahoma (ante 63), held that replacement value was to be considered.

This Court knows judicially what the agencies of the Government have done, if such agencies have any legal functions, and from that judicial knowledge is familiar with the fact that the Department of Justice long refused to make any ruling as to what was a reasonable profit, the practice was to refer all requests for information to the various Fair Price Committees and District Attorneys. These all had their own ideas and hardly any two localities had the same rule.

It was not until after the sales here charged to have been made were made (rec. 22, 31) that the Attorney General stated any rule, and that rule was that the profit on sugar should be 1 cent a pound over cost. Prior to this date the committee in Atlanta had fixed .65 of a cent, 1 cent, 1¼ cents and 1½ cents at different times (rec. 47). The Attorney General defined cost one way (rec. 43, ante 5) and in Atlanta cost meant quite a different thing. Merchants were committed to the government of men, to uncertainty and to differing rules of conduct, such rules depending upon the fiat of each particular agency.

(b) *Argument and Authorities.*

Paragraph 1, Section 2, Article 4, of the Constitution reads:

> The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.

Some citizens could get a profit over market value. Plaintiff in error was told by the price fixer in Atlanta that such a privilege was denied it; citizens of those States where the definition of cost given by the Attorney General was obeyed had one cost, Plaintiff in error had another. These and other denials of equality under the law are perhaps inseparable from any statute so vague and indefinite as the one under discussion, but such inequality however caused, violates the Constitution of the United States.

In *Ward v. Maryland*, 12 Wallace 418, 20 L. Ed. 449, 453, Article 4 of the Constitution was considered, and this Court said:

> Inequality of burden, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the Confederation; and the new Constitution was adopted, among other things, to remedy these defects in the prior system.
>
> Evidence to show that the framers of the Constitution intended to remove those great evils in Government is found in every one of the sections of the Constitution already referred to, and also in the clause which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another, showing

> that Congress, as well as the states, is forbidden to make any discrimination in enacting commercial or revenue regulations * * * *.
>
> Much consideration was given to those clauses of the Constitution in the Passenger Cases, 7 How. 400-414, and they were regarded as limitations upon the power of Congress to regulate commerce, and as intended to secure entire commercial equality.

In the Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394, this Court discussed constitutional rights at length. Beginning at page 75 of the official report, page 408 of the law edition, the Court points out that the Articles of Confederation contained a clause protecting privileges and immunities. Cases are cited showing that these words were intended to protect the citizens against special laws and regulations, and that the privileges and immunities of citizenship were the same throughout the country.

Among other privileges named, the Court places the right,

> to pursue a lawful employment in a lawful manner without other restraint than such as equally affects all persons.

Further speaking, p. 96 official, 415 law edition, of the paragraph of the 4th article, referred to above, the Court said:

> It is a clause which insures equality in the enjoyment of these rights between citizens of several States while in the same State.

And at page 101 offical report, 416 of the law edition, the Court shows that the 4th article restrains Congress as the 14th amendment restrains the States. At pages

109 and 110 of the official edition, 419 of the law edition, expressions are used as follows:

> "Equality of right among citizens."
>
> "Equally upon all others of the same age, sex and condition."

And said the Court:

> This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country, our government will be a republic only in name.

In *Blake v. McClung*, 172 U S. 239, 43 L Ed 432, 19 Sup. Ct. 165, the Slaughter House Cases are discussed and the principles above referred to reiterated.

The exemption of farmers and others is a further unlawful discrimination.

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. Ed. 679, 22 Sup. Ct. 431, where, in referring to the Fourteenth Amendment, which, as shown above, is comparable to Article 4, this Court said:

> No impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923, 924, 5 Sup. Ct. Rep. 357, 359. This language was cited with approval in *Yick Wo. v. Hopkins*, 118 U. S. 356, 369, 30 L. Ed. 220, 226, 6 Sup. Ct Rep. 1064, 1070, in

> which it was also said that "the equal protection of the laws is a pledge of the protection of equal laws". In *Hayes v. Missouri*, 120 U. S. 68, 71, 30 L. Ed. 578, 580, 7 Sup. Ct. Rep. 350, 352, we said that the Fourteenth Amendment required that all persons subject to legislation limited as to the objects to which it is directed or by the territory within which it is to operate, "shall be treated alike under like circumstances and conditions both in the privileges conferred and the liabilities imposed". "Due process of law and the equal protection of the laws", this Court has said, are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the "powers of government". *Duncan v. Missouri*, 152 U. S. 377, 382, 38 L. Ed. 485, 487, 14 Sup. Ct. Rep. 570, 572. Many other cases in this court are to the like effect * * * *. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.

On these principles the Illinois anti-trust laws which exempted farmers were held invalid.

Judge Anderson, *United States v. Armstrong*, 265 Fed. 683, fully sustains the argument on this point.

SECTION 8. ARBITRARILY TO DEPRIVE AN OWNER OF PART OF THE VALUE OF HIS PROPERTY IS TAKING PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION, AND DENIES DUE PROCESS OF LAW.

(a) *Statement of This Part of the Case.*

The findings of the Presidential agencies, made *prima facie* correct by the charge of the Court, are conflicting, but each takes the part of the property of Plaintiff in error, which is the difference between cost and value. On the day it is charged that Plaintiff in error sold sugar for 20 cents a pound, the value exceeded that price (ante, p. 22-23).

(b) *Argument and Authorities.*

While a rule of evidence making some facts *prima facie* evidence may be valid, when the rule in substance excludes consideration of a definite property right it is not valid. No standard of reasonableness is provided for in the statute. The only guide that was given the jury was the price fixed; and although that guide was said to be *prima facie* only, there being no other possible guide, *prima facie* became conclusive. A rule of evidence which actually concludes a jury is invalid, and whatever the form, the rule here is the only rule and therefore a conclusive rule.

Little Rock, etc., R. Co. v. Payne, 33 Ark. 816, 34 Am. Rep. 55.

This issue has already been discussed and further discussion would be but a repetition (ante 28-32).

SECTION 9. THE STATUTE AND THE INDICTMENT ARE VOID FOR UNCERTAINTY, VAGUENESS AND INDEFINITENESS.

(a) *Argument and Authorities Generally.*

The elementary rule is that penal statutes must be strictly construed, and it is essential that the crime punished must be plainly and unmistakably within the statute.

Ballew v. United States, 160 U. S. 187, 197, 40 L. Ed. 388, 393, 16 Sup. Ct. 263.

Laws which create crimes ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. Before a man can be punished his case must be plainly and unmistakably within the statute.

United States v. Brewer, 139 U. S. 278, 288, 35 L. Ed. 190, 193, 11 Sup. Ct. 538, citing

United States v. Sharp, Pet C. C. 118;

United States v. Lacher, 134 U. S. 624, 33 L. Ed. 1080, 1083, 10 Sup. Ct. 625.

These elementary principles are necessary in any free government and are not directly disputed. They were, prior to recent months, universally applied by the Courts of this country. Recently some of the Judges of the District Courts and of a Circuit Court of Appeals have held the statute here under discussion valid; thereby it is submitted, disregarding these rules.

Judge Pollock, *United States v. Robinson*, — Fed. —, not yet reported, did not hold the statute void but did

hold that an indictment charging the crime in the language of the statute was void. He said:

> All that is here charged against defendants is a conspiracy to charge excessive prices for the necessary commodities by them sold. What constitutes this excessive price is no where defined, stated or charged. What the true or intrinsic value of this necessary food product in comparison with other necessary food commodities is not stated. In certain of the cases at least defendants are charged as wholesale merchants dealing or trading in this necessary food product at wholesale, in which event, to remain in such business, of necessity, they must continue to replace the stock of this commodity as exhausted by sales. Yet, in no manner or way is such replacement cost or value stated * * * *.
>
> What is an excessive price or a low price for any commodity, in all reason, is, and ever must continue to be one of comparison, only. "There is nothing either good or bad, but thinking makes it so." Being a matter capable of ascertainment only by comparison, and incapable of being judged by any fixed standard, and in the end, controlled by the law of supply and demand, can it be possible for the law making power, in the first instance, to create a criminal offense in such vague, indefinite, uncertain language as is that found in clause "e" of the amendment, above set forth; and, having done this, again, is it possible under the settled principles of criminal practice and procedure in the courts of justice of our country, guided by a written constitution, to charge a citizen with the commission of a crime in the vague, indefinite, uncertain, general language of this enactment? I do not believe, and if it be so held, now or in the future by our

courts, then our much vaunted freedom of the individual citizen from oppression will become as unstable, uncertain and untrustworthy as hieroglyphics written in mud.

(*b*) *Argument and Authorities of the Trial Judge.*

The opinion on demurrer in this case of the Honorable Samuel H. Sibley, District Judge, is as well argued as and is more comprehensive than most of the opinions heretofore rendered holding this statute valid and covers the grounds of such other opinions so fully that a discussion of the arguments of Judge Sibley makes unnecessary detailed reference to other opinions. Judge Sibley's opinion is copied in the record (pp. 4-8) and reported in 264 Fed. 691. This opinion may fairly be summarized as presenting six arguments in support of the validity of the statute:

1. Magna Carta does not grant both trial by jury and the right to judgment according to the law of the land.

2. Many civil rights are dependent on a determination of what is meant by "reasonable time," "reasonable care," etc.

3. Criminal statutes, long in force, like those prohibiting "opprobrious words," "obscene language," "indecent or disorderly conduct," etc., have been sustained.

4. The consequences of homicide and other acts are uncertain, such consequences being criminal or not as a jury may determine.

5. The Articles of War are indefinite.

6. *Nash v. United States*, 229 U. S. 373, 57 L. Ed. 1232, 33 Sup. Ct. 780.

This grouping of the argument of the trial judge is not intended to state his arguments, but merely to divide a discussion thereof.

(1) *Magna Carta.*

The learned trial judge quotes Magna Carta as follows:

> No free man shall be taken or imprisoned * * * * save by the lawful judgment of his peers, *or* by the law of the land.

He then comments by saying that the language seemingly expresses content at a condemnation either by a jury (presumably without law) or by law, without a jury. Judge Sibley used the popular translation of Magna Carta; but his conclusion disregards the context and the fundamental purpose of the Great Charter and the popular version is not the one accepted by the best scholars.

The conclusion of Chapter 39 of the Magna Carta reads:

> "Nisi per legale indicium parium suorum *vel* per legem terrae."

Latin lexicons, especially unabridged ones, translate in some instances "vel" as *"and"*. Among others, Leverett's Latin Lexicon, where it is said "vel is used with a copulative force when it may be rendered *and*". This Lexicon cites as authority quotations from both Vergil and Cicero.

Pollock and Maitland, History of English Law, volume 1, page 173, note 3, after quoting the conclusion of chapter 39, above, say:

In mediaeval Latin "vel will often stand for 'and'."

The Encyclopedia Britannica, in the article on Magna Carta, translates "vel" as "and."

(2) *Uncertainty in Civil Proceedings.*

This subdivision of the trial judge's argument is answered by the fact that the sixth amendment applies only to criminal prosecutions.

(3) *Some Criminal Statutes Long in Force Are Themselves Indefinite.*

Some of the statutes referred to by the learned trial judge are themselves probably invalid, at least their validity has not been determined by competent authority. Others of these statutes are prohibitions of acts which for centuries have been penalized. "Opprobrious words," "abusive language," "fraud," "deceit," "notorious," "indecent," "obscene," "vulgar," "profane," and similar words have been used in criminal statutes for centuries and thus have gained a definiteness of meaning.

District Judge Woodrough, *United States v. Bernstein*, —— Fed. ——, not yet reported, in discussing this argument, aptly said:

> It must be conceded that many generic, broad descriptions of offenses have become definite and are upheld and enforced and it is not in all cases easy to determine when an accused is informed of the nature and cause of the accusation. It would unduly extend this memorandum to review the many intricate and difficult problems presented to the courts under this constitutional provision. I do not find any adjudica-

tions, however, in the Supreme Court which appear to me to conflict with my conclusion that the law in question contravenes the sixth amendment and is void for that reason.

(4) *The Consequences of Some Acts Are Criminal or Not as a Jury May Decide.*

Using the illustration adopted by Judge Sibley the result of a homicide may be murder, manslaughter, or justifiable homicide, "of which the jury in all cases shall be the judge." Homicide in violation of the statute, is a known and definite crime. It may be that he who does the killing may be uncertain as to the consequences to himself, but when he starts he definitely knows that he is embarking on a criminal journey even though the end of the journey is not discernible. He need not kill.

The merchant must sell his goods, he lawfully may do so; it is only when he exceeds what someone may thereafter say is a reasonable price that he is denounced as a criminal. His journey must be taken and is lawful, but at some unknown and unknowable point he must stop. Clearly there is a distinction between what the merchant does and must do and what the killer does, but need not do.

(5) *The Articles of War.*

In *Carter v. Roberts*, 177 U. S. 496, 44 L. Ed. 861, 20 Sup. Ct. 713, this Court pointed out that the Articles of War are authorized by Section 8 of Article 1 of the Constitution, and that every officer

> Subscribes to these articles and places himself within the power of courtsmartial to pass on any offense which he may have committed in contravention of them.

(6) *The Nash Case.*

In *Nash v. United States*, 229 U. S. 373, 57 L. Ed. 1232, 33 Sup. Ct. 780, the crime charged was a violation of the statute prohibiting restraint of trade. The offense is well known to the law and was a crime at common law. He who seeks to restrain trade knows what he is doing, and that the enterprise is one he need not undertake and one which he undertakes fully cognizant of its dangers. The acts charged in the indictment in the Nash Case are stated clearly and in detail and are all wrongful. The only possible doubt is as to the extent of the effect of such acts. Here the act, that of selling is lawful and right, unless some jury may think the selling rate or charge is unreasonable. In the Nash Case a wrongful act pursued far enough becomes a criminal act; in this case a rightful act is right or wrong, lawful or unlawful, according to the most uncertain of all mental processes, the verdict of a petit jury.

(c) *Authorities Relied on by Plaintiff in Error.*

Perhaps the leading authority directly in point here is that of *United States v. Tozer*, 52 Fed. 917, 4 Int. Com. Repts. 245. Mr. Justice Brewer and Circuit Judge Caldwell there had for consideration a statute substantially similar to the one here under discussion. If the Tozer Case correctly states the law, this case must be reversed. That case cites sustaining authority and there have been several cases following that opinion, some cases distinguishing; but although decided 28 years ago, there is none overruling it. That case cannot be distinguished from this.

This Court first cited the Tozer Case in *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 109, 53 L. Ed. 417, 429.

430, 29 Sup. Ct. 220, and while expressing no doubt as to the correctness of Mr. Justice Brewer's opinion, pointed out the distinction between a case arising under the monopoly statutes and one arising under a rate fixing statute. It was there said:

> But the Texas statutes in question do not give the power to a court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable, as do the statutes condemned in the cases cited.

The next citation by this Court of the Tozer Case was in the Nash Case, discussed (ante, p. 80). The Nash Case was explained as referring to degree and the principle of the Tozer Case was stated by this Court in *International Harvester Co. v. Kentucky*, 234 U. S. 216, 223, 58 L. Ed. 1284, 34 Sup. Ct. 853, where the author of the opinion in the Nash Case said:

> The reason is not the general uncertainties of a jury trial, but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind.

"Real value", which is no less certain than "unreasonable rate or charge" in a criminal statute, was held by this Court to be so uncertain as to make such statute "fundamentally defective".

> *Collins v. Kentucky*, 234 U. S. 634, 638, 58 L. Ed. 1510, 1512, 34 Sup. Ct. 924.

In *United States v. Reese*, 92 U. S. 214, 23 L. Ed. 563, this Court discussed a statute which made it a crime to refuse to receive and count the votes of qualified voters. In the course of the opinion Chief Justice Waite stated the principle applicable here:

> It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the Government.

That the statute here is void appears from the decision of this Court in the Texas, the Harvester, and the Collins Cases, *supra*, from Bish. Cr. Law, Vol. 1, Sec. 291, and from the cases following:

United States v. Tozer, 52 Fed. 917;

Louisville & N. R. Co. v. Railroad Com. of Tenn., 19 Fed. 679;

Chicago & N. W. Ry. Co. v. Dey, 35 Fed. 866, 1 L. R. A. 744, 2 Int. Com. Com. Rep. 584;

Louisville & N. R. Co. v. Kentucky, 98 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457;

United States v. Capital Traction Co., 34 App. D. C. 592, 19 Ann. Cas. 68;

Czarra v. Board of Supervisors, 25 App. D. C. 443;

Ex Parte Jackson, 45 Ark. 158;

Hayes v. State, 11 Ga. App. 371, 75 S. E. 523;

Empire Life Ins. Co. v. Allen, 141 Ga. 413, 81 S. E. 120;

Strickland v. Whatley, 142 Ga. 802;

A. M. Halter Hardware Co. v. Boyle, 263 Fed. 134;

United States v. Cohen Grocery Co., 264 Fed. 218;

Retail Dry Goods Asso. v. District Attorney (Colo.), —— Fed. ——;

Detroit Creamery v. Kinney, 264 Fed. 845;

Lambora v. McAvoy, —— Fed. ——, not yet reported;

United States v. Armstrong, 265 Fed. 683.

There have been other holdings by District Judges that the Food Control Act is void for uncertainty, but in many such cases no opinions were filed.

(*d*) *Legislative History of Food Control Act Amendment.*

The legislative history of the Amendment of October 22, 1919, shows its invalidity.

Senators Smith, of Georgia; Johnson, of South Dakota; Thomas, of Colorado, and other Senators stated that the proposed legislation was void because uncertain and discriminatory. (Cong. Rec., Sept. 12, pp. 5620-5623.)

On September 12, 1919 (record, 5622), Senator Gronna being absent, Senator Kenyon, the ranking member of the committee, said:

Mr. Kenyon:

> Mr. President, I do not like the proposed legislation. I do not think anybody is enthusiastic about it. It is difficult legislation. If it was to be permanent legislation it would not secure my vote. But the Attorney General has come to Congress, and the President has done so, asking for this legislation. It is only going to be a period of perhaps 30 days, and in the meantime the Attorney General may be able to accomplish something by it. That is the only justification that I can get into my mind for voting for it.

(c) *If, As the Trial Judge Held, the Prices Fixed by Governmental Agencies Are Prima Facie Correct Without a Hearing, Due Process of Law Is Denied Because of Deterrents to a Test.*

This principle is definitely established in this Court, *Oklahoma Operating Co. v. Love*, 252 U. S. 331, where, in discussing a less burdensome statute, it was said:

> Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the acts relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of those rates. *Ex Parte Young*, 209 U. S. 123, 147, 52 L. Ed. 714, 723, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; *Missouri P. R. Co. v. Tucker*, 230 U. S. 340, 349, 57 L. Ed. 1507, 1510, 33 Sup. Ct. Rep. 961; *Wadley Southern R. Co. v. Georgia*, 235 U. S. 651, 662, 50 L. Ed. 405, 411, P. U. R. 1915 A 106, 35 Sup. Ct. Rep. 214.

CONCLUSION.

Let this brief close with the pertinent statements of Judges Putnam and Bourquin.

Judge Putnam, of the Circuit Court of Appeals, in *United States v. Winslow*, 195 Fed. 578, 587, a case later affirmed by the Supreme Court, said:

> We have lived in so much peace for more than a century under the protection of the constitutional provisions to which we refer that whole masses of citizens and some of their leaders are slumbering in reference to them, while our forefathers who were brought into almost immediate contact with all the devices to which tyranny was accustomed, were fully awake. The courts, however, are not permitted to slumber.

In *Ex Parte Jackson*, 263 Fed. 110, 113, Judge Bourquin said:

> The inalienable rights of personal security and safety, orderly and due process of law, are fundamentals of the social compact, the basis of organized society, the essence and justification of government, the foundation, key, and capstones of the Constitution. They are limited to no man, race, or nation, to no time, place or occasion, but belong to man, always, everywhere, and in all circumstances. Every nation demands them for its people from all other nations. No emergency in war or peace warrants their violation, for in emergency, real, or assumed, tyrants in all ages have found excuse for their destruction. Without them democracy perishes, autocracy reigns, and the innocent suffer with the guilty. Without them is no safety, peace, content, happiness, and they must be

vindicated, defended and maintained in the face of every assault by government, or otherwise.

Respectfully submitted,

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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

OGLESBY GROCERY COMPANY, PLAINTIFF in error,
v.
THE UNITED STATES.
No. 457.

ON WRIT OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

MOTION TO ADVANCE.

Comes now the Solicitor General, on behalf of the defendant in error in the above-entitled cause, and respectfully moves that it be advanced and set for hearing on October 11, 1920, with other cases based on the same general questions now pending before this court.

The case involves the constitutionality of the act of August 10, 1917, c. 53 (40 Stat. 277), commonly known as the Lever Act, as amended by the act of October 22, 1919, Title I, section 2 (41 Stat. 298), declaring it unlawful for any person "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," and authorizing fine or imprisonment, or both, for violation of

its terms. This is the same question involved in cases Nos. 324, 357, and 367, which have heretofore been advanced and set for October 11th next, and, for the convenience of the court and counsel, this case should be disposed of at the same time those cases are decided.

Opposing counsel concur in this motion.

WM. L. FRIERSON,
Solicitor General.

○

No. 457.

In the Supreme Court of the United States.

October Term, 1920.

Oglesby Grocery Company, plaintiff in error,

v.

The United States of America.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF FOR THE UNITED STATES.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1920

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OGLESBY GROCERY COMPANY, PLAINTIFF in error, *v.* THE UNITED STATES OF AMERICA. | No. 457.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF FOR THE UNITED STATES.

The writ of error in this case seeks a review of the judgment of the District Court upon the verdict of a jury convicting the plaintiff in error of violating section 4 of the act of August 10, 1917 (40 Stat., c. 53, p. 276), known as the Food Control or Lever Act, as amended by section 2 of the act of October 22, 1919 (41 Stat., 1st sess., c. 80, p. 297), and imposing a fine of $2,000.

STATUTES INVOLVED.

The Food Control or Lever Act of August 10, 1917, recites that it was enacted, among other things, "to assure an adequate supply and equitable distribution" of certain enumerated necessaries, including food, and to "prevent, locally or generally, scarcity,

monopolization, hoarding, injurious speculation, manipulations, and private controls, affecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessaries during the war."

Section 4 of the act provides that it shall be unlawful, among other things, for any person "to make any unjust or unreasonable rate or charge, in handling or dealing in or with any necessaries." The act, however, did not provide directly for a penalty for making unjust or unreasonable rates or charges. The means adopted for enforcing this part of the act were provided in section 5. That section authorized the President, when he should find it essential, to license those dealing in necessaries and to prescribe regulations for the issuance of such licenses. It was then provided that whenever the President shall find "that any storage charge, commission, profit, or practice of any licensee is unjust, or unreasonable * * *," he may revoke the license unless such condemned practice shall be discontinued; and that—

> The President may, in lieu of any such unjust, unreasonable, discriminatory, and unfair storage charge, commission, profit, or practice, find what is a just, reasonable, nondiscriminatory, and fair storage charge, commission, profit, or practice, and in any proceeding brought in any court such order of the President shall be prima facie evidence.

The criminal offense created by this section of the act is that one engaging in a business for which the presidential license is required, without obtaining

such a license, or after it has been revoked, shall be guilty of a criminal offense. For a considerable time, during actual hostilities and after the signing of the armistice, the President fixed the prices or the rate of profit which could be charged for many necessaries. Later, it was not deemed necessary to continue the elaborate licensing system and Congress, for the purpose of providing a method of enforcing the prohibition against unreasonable charges and rates, passed the act of October 22, 1919. Section 2 of that act amends section 4 of the act of August 10, 1917, and, in express terms, makes it a crime, punishable by fine or imprisonment, or both, "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries."

THE INDICTMENT.

The indictment, in each of four counts, charges the plaintiff in error with unlawfully and willfully making an unjust and unreasonable charge in handling and dealing in certain necessaries, to wit, in selling a certain quantity of granulated sugar to a specified person on the 13th day of April, 1920. The specific charge is that the plaintiff in error "did make a charge of twenty cents per pound therefor when and while seventeen and three-fourths cents per pound then and there was a just and reasonable charge for said sugar, and any charge in excess of seventeen and three-fourths (17¾) cents per pound therefor then and there was excessive, unjust, and unreasonable, the said Oglesby

Grocery Company, lately theretofore, having purchased the said sugar from the Savannah Sugar Refining Company at the price and charge of sixteen cents per pound on board cars at Savannah, Georgia, and the transportation charges thereon from Savannah to Atlanta then and there being twenty-six and nine-tenths (26.9) cents per hundred pounds." (Rec., pp. 1–3.)

PROCEEDINGS IN THE COURT BELOW.

The plaintiff in error, by demurrer, challenged the constitutionality of the act on which the indictment was based. This demurrer was overruled. (Rec., pp. 4–9.) The case was tried by the court and jury and resulted in a verdict of guilty on all four counts and a fine of $2,000. (Rec., p. 9.)

CONTENTIONS OF PLAINTIFF IN ERROR.

The plaintiff in error now raises the same objections to the constitutionality of the act in question that have been made in other cases which will be considered by the court simultaneously with this case.

In addition, it insists that, even if the act is constitutional, the judgment below is improper for various reasons set out in the assignments of error. These assignments relate to the action of the court in admitting and excluding evidence and in his instructions to the jury. Most of them are based on the contention that improper weight was given to the action of fair-price committees in fixing prices,

and the further contention that, in determining what is a reasonable rate or charge for necessaries sold at a given time, the test is whether the merchant has made an excessive charge over and above what it would have cost him at the time of the sale to replace the article sold, whereas the ruling of the court below made the test whether the price charged included an unreasonable excess over and above what the article sold had actually cost the merchant. In other words, the claim is that, while the sugar involved in this case had cost only something over 16 cents per pound, the market price of sugar in Atlanta had increased until, in order to have replaced the sugar sold, the plaintiff in error would have had to pay something like 25 cents per pound. It is therefore insisted that plaintiff in error has not made an unreasonable charge, unless he has charged an excessive amount over and above 25 cents.

ADMINISTRATIVE ACTION UNDER THE LEVER ACT.

The Lever Act of August 10, 1917, provided in section 1 that—

> The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this act.

Section 2 of that act was as follows:

> That in carrying out the purposes of this act the President is authorized to enter into any voluntary arrangements or agreements, to create and use any agency or agencies, to

> accept the services of any person without compensation, to cooperate with any agency or person, to utilize any department or agency of the Government, and to coordinate their activities so as to avoid any preventable loss or duplication of effort or funds.

Pursuant to these and other provisions of the act, the President availed himself of the services of persons throughout the country by creating what were called "fair-price committees," for the purpose of gathering the necessary data and determining what, under all the circumstances, would be fair and reasonable prices for necessaries. In addition, up to 1919, and during part of that year, a special control was maintained over the sale and distribution of sugar. Through proper agencies, the President acquired control of all available raw sugars. These were delivered to the refiners and, through them, to the wholesalers, the price to be charged by the refiner, the wholesaler, and the retailer being definitely fixed. Under this plan, as it existed in the summer of 1919, the wholesaler was allowed to charge for sugar 65 cents per 100 pounds above cost and freight. (Rec., p. 23.) When the Act of October 22, 1919, made the selling of necessaries at unreasonable prices a criminal offense, the operations of the fair-price committees were continued for the twofold purpose of furnishing the Attorney General with proper data upon which to determine what prices were so excessive as to require prosecutions, and for the further purpose of giving notice to merchants as to the prices beyond which

they could not go without subjecting themselves to prosecution. In the fall of 1919 the fair-price committee raised the profit of 65 cents theretofore allowed to $1 per 100 pounds. And plaintiff in error and other merchants had notice, at the time the sales now in question were made, that prices in excess of that would be regarded as unreasonable and subject the seller to prosecution. (Rec., p. 22.)

It is true that a short time after these sales the fair-price committee at Atlanta reached the conclusion that the allowed profit of $1 should be increased to $1.50, but the Attorney General did not concur in this conclusion and the action of the committee was, within a short time, rescinded. (Rec., p. 22.)

STATEMENT OF THE CASE AS PRESENTED TO THE JURY.

Plaintiff in error bought the sugar in question at a cost, including freight, of 16.269 cents per pound, and, very shortly thereafter, on April 13, 1920, sold it at 20 cents per pound. The charge which it thus made for handling and dealing in this sugar was 3.731 cents per pound, or nearly 23 per cent of invoice cost plus freight.

Prior to the passage of the act of October 22, 1919, the wholesalers were paying between 8 cents and 9 cents per pound for sugar and were allowed to charge 65 cents per 100 pounds above invoiced price and freight. (Rec., p. 23.) This price had been fixed as reasonable by the President through fair-price committees and other agencies. This was done during the time when the Government, by controlling raw

sugars, fixed the cost of sugar to the wholesaler at between 8 cents and 9 cents per pound. When the act of October 22, 1919, was passed, however, conditions had changed and the wholesaler was having to pay more for his sugar. Through the fair-price committees, then, the profit allowed was raised from 65 cents to $1, and this continued to be the rate allowed until after the sales involved in this case.

Prior to the war, and in normal times, it was the custom of wholesale merchants to handle sugar at a very narrow margin of profit. It was a staple which sold readily and with little expense, and hence was always handled at a small profit. Two witnesses, one testifying for the Government and one for the plaintiff in error, make substantially the same statements on this subject. and these statements are not controverted. The Government's witness says:

> The jobber handled sugar largely as the retailer did, largely as a matter of advertisement and accommodation to his customers. I can swear that it has not been the custom for a jobber or retailer ever to make anything that would be called a fair percentage of profit on sugar. The usual and customary profit in this market to a wholesaler selling sugar is dependent largely on the credit rating and the credit responsibility of or the prompt paying of the bills by the retailer what percentage of profit the jobber received. If it was on a cash sale from thirty-five cents a barrel of 350 pounds average to one dollar a barrel. The man who paid a dollar a barrel profit was not as careful on his buying; he wasn't as good buyer as the

man who could buy at thirty-five cents a barrel.

The margin of fluctuation for the wholesaler's profit ran from thirty-five cents to a dollar a barrel, but I don't want the jury to understand me to swear that no jobber ever charged higher profit than a dollar a barrel. I don't want to convey that impression. I would say that from thirty-five cents to a dollar dependent on the ability of the customer to buy on a close margin of profit to the wholesaler, as to whether it was nearer the lower price or nearer the higher price. And that time the invoiced price of sugar running to the wholesaler, I would say over a period of years, ran from four and and a half probably to six and a half cents per pound. (Rec., p. 23.)

The witness for plaintiff in error said:

In prewar times the price of sugar to the wholesaler ran from four and a half to seven or eight cents. It varied a good deal. And at that time we paid for the sugar on seven days after arrival. We handled sugar, in a very large measure, as a matter of accommodation to our customers. That was one consideration. It served as advertising, in a way. There was a profit in it, but not a large profit; the profit was smaller than on other things. The profit on a barrel of sugar, on a full round market it would run from 25 to 50 cents a hundred pounds. That would be about one-fourth of a cent per pound. There was not enough profit in it to handle it at that, to handle the sugar by itself and nothing else. (Rec. p. 46.)

Thus, these two witnesses agree that, in normal times, the wholesale merchant had been accustomed to get something like from 25 cents to 35 cents per 100 pounds profit on his sales of sugar.

There was evidence to the effect that, in normal times, it was the custom of merchants, when the price of sugar which they had bought advanced, to get, if they could, their usual profit over and above the market price at the time of selling, or at least to get the benefit of a part of this advance. These advances, however, were usually small, one witness saying—

> During the period before the war sugar did not fluctuate rapidly; ten points was usually about as much as sugar would change at a time, up or down. And that the fluctuations were usually seasonal; that is, when the crop first came in it would be lower, and would go up a little until the new crop came in, so the merchant buying sugar knew practically what he could get sugar for from time to time. (Rec., p. 34.)

Nor did the wholesaler always get the advantage of these advances. A witness for the plaintiff in error explains the situation thus:

> In this prewar condition, I think we paid from four and a half to seven and a half for sugar. The market varied. We followed the market if the market advanced; we got from a quarter to a half a cent a pound on it. Based on the invoice cost—invoice plus freight. That was the rule. It was always

> sold on a narrow margin. It was a staple article. The practice was if I bought at five cents to sell at five and a quarter or five and a half based on invoice plus freight on a steady market. The profit on sugar, except on an advancing market, rarely ever reached the percentage of cost of doing business. It was almost always under.
>
> If the situation was such that I could not advance with the market, for instance, I bought it at five cents and it went up to seven, and when I tried to sell at a profit over replacement value of seven cents I found that there was active competition here, offering at five and a half, less or more, less than seven, I could not get replacement and profit. I usually held the sugar until the fool sold his out and got my profit. I don't mean fool in an offensive sense, but a business man who does not, on a staple article like sugar, follow the market up is a fool business man. (Rec., p. 54.)

This witness was asked then as to the effect of this custom in the event of a very large advance in market price and gave some very interesting testimony, saying:

> If I bought sugar at sixteen cents and got in a carload and there wasn't but very little sugar in town, the sugar went up, I would believe in following the market. Reasonably so, but in the wholesale grocery buinesss, it is a man's trade that he is dependent on and I think the wise wholesale merchant usually tries to take care of his trade and doesn't try to hog them,

> but give them stuff they can sell all the time on the market, and I believe that if a man gets sugar in that cost him eighteen cents and the market was in a bad condition and it went up to twenty-nine or thirty, I believe that a wholesale merchant would be a pig if he charged his regular trade that much for it. * * * I think it is right for a man to take his advance, if it advances from nineteen cents to twenty-nine cents on a steady market on that, I think it is right, I think he is entitled to it, but you forget that I said a wholesale man had a certain line of trade that he has been selling probably for years, and he would only defeat his profit with them and would not want to take it. If a man had that opportunity to go from 18 to 29 cents and under practical competition here in the market and did not have a line of customers, and had that opportunity to make a great big profit, I think ninety-nine men out of every hundred would take it. I don't think that his conscience ought to restrain him, if he bought that building over there for two hundred and fifty thousand dollars, and sold it for a million—trades like that have been made all around town here. (Rec., p. 55.)

There was evidence tending to show that on April 13, 1920, wholesale dealers in Atlanta could not have bought sugar as low as 20 cents a pound.

What it actually cost for the wholesaler to handle sugar is well illustrated by the testimony of the witness James Lyons. This witness is connected with one of 51 wholesale grocery stores operated by one Creasy under the name of "Creasy Company."

These stores are operated somewhat on the cooperative plan, each retail merchant who desires to buy from the company pays in $300, and the aggregate of these payments is the capital on which the company does business. Creasy, as the head of the concern, receives for his services one-half of 1 per cent of all sales made. The plan is to sell to the merchants at actual cost—that is, the goods are sold at prices which yield a profit sufficient only to pay the expenses of running the stores and the one-half of 1 per cent which goes to Creasy. These stores are operated exactly as other wholesale grocery stores, except that no traveling salesmen are employed. The witness was employed to manage the Creasy store at Atlanta. He testified as follows:

> In my present business I have the usual expenses that other wholesalers have, in cost and interest; they have some expenses we do not. I have rent, employees, deliveries, interest, and I have men employed in my place of business, I think about twelve. There is expense that I do not have that other grocers do, they travel men and we do not. There is no other expense that I know of. My company pays no dividends in the ordinary sense. We pay Mr. Creasy one-half of one per cent on the volume of business done. The only expenses, the dividends and traveling men, that I do not have that the other grocers have. My business is conducted like any other grocer's business. I buy and sell. The margins of profits on the cost I allow to pay expenses outside of what I pay Mr. Creasy,

> runs different on different articles. We handle sugar and flour on a one per cent basis. Mr. Creasy gets one-half of one per cent and that leaves us one-half. I have one-half of one per cent on sugar and flour for the purpose of paying expenses of doing business. On other articles, three per cent. I do not get the three per cent where I don't handle the goods, but one per cent. I call goods I sell without handling, anything that is drop-shipped from the factory. That is where I don't take it out of the car, but pass it on to our customers. We do not have more than three per cent on anything. Our company has other stores elsewhere. They have been carrying on that sort of a business in the United States twelve years or more. They have never failed to make expenses on that, I think not. Out of the three per cent no one gets anything out of it except Mr. Creasy himself, and he gets one-half and the business gets the other two and a half per cent. (Rec., pp. 66-67.)

It will be seen that this business is conducted as other witnesses testify that the grocery business generally was conducted—that is, that sugar was an article on which the narrowest margin of profit was always charged. The testimony thus quoted shows that on sugar costing, including freight, $16.29 per 100 pounds, a profit of 1 per cent, or 16 cents, would pay its share of the expenses of conducting a grocery business in the ordinary way. If an advance of $1 per 100 pounds, or 1 cent a pound, be allowed as a reasonable rate, there would be left, as profit, 84 cents per 100 pounds.

On the trial of the case the Government introduced, as a witness, the fair-price commissioner. This man had been in the grocery business for many years. His testimony dealt with the different matters to be considered in determining reasonable prices, and explained the manner in which the fair-price committee had reached its conclusions. When he was asked to explain the methods of the fair-price committee, objection was interposed upon the ground that the fair-price committee had no legal function to perform and that the testimony was therefore immaterial. The objection was overruled, the court saying:

> The statute seems to give the witness an official position which qualifies him to reach a conclusion and that evidently ought to make his conclusions evidence—not conclusive evidence but as evidence in this case. (Rec., p. 21.)

The court, however, made it plain that the mere fact that the fair-price committee had fixed a price did not establish that a higher price would be unreasonable. Counsel insisted that if the prices so fixed were to be used against plaintiff in error, "we ought to have been charged with violating the prices fixed by the fair-price committee." But the court ruled:

> I don't think you could be. The fair-price commission could not make a crime, but they might make some evidence that would illustrate their story of a criminal case, but not

> make a crime. No order made without a full hearing should be conclusive, but I think it was within the power of the legislature to make it evidence although without any formal hearing, and I think in this case we have a situation in which there is a proceeding brought in this court and in which the orders of the President, made through this board, would be evidence. I think they are admissible. What effect the jury will give them in their decision of the case is a matter to be dealt with later. (Rec., pp. 20–21.)

And in the charge the jury was instructed that—

> The Government says that a just and reasonable rate had been fixed by the President through the agency of the Attorney General and also through the agency of the fair-price commission at Atlanta. Evidence has been introduced as to what these agencies of the President had determined to be a fair and just rate in handling sugar at wholesale. That evidence has been admitted before you for what you think it is worth. It is not conclusive; it is not a judgment; the Oglesby Grocery Co. was never called before either one to have a hearing about it so that a trial could be had to fix the thing. It is admitted only as prima facie evidence as to what the Attorney General and the fair price commission decided was just and reasonable. (Rec., p. 76.)

BRIEF.

I.

Constitutional objections to the acts in question.

The questions raised in this case against the validity of the acts upon which the indictment is based are substantially the same as those urged in the cases of *United States* v. *Cohen Grocery Company*, No. 324; *Tedrow* v. *A. T. Lewis & Son Dry Goods Company*, No. 357, and *Kennington* v. *Palmer, Attorney General*, No. 367, which are to be heard and considered by the court simultaneously with this case. The Government's argument of these questions has been fully presented in the briefs filed in those cases and will not now be repeated. Those briefs, as well as the opinion of Judge Sibley in this case (Rec. pp. 4–8), are referred to and adopted as the answer to the brief filed in this case, and the present brief will be confined to a discussion of the questions arising on the trial, assuming the constitutionality of the act.

II.

This legislation treats the capital and energy employed during the war in the production and distribution of necessaries as employed in a business impressed with a public interest and seeks to regulate the charges for the services rendered.

The price which the consumer pays for any commodity includes the cost of production with the added charges of every agency or dealer handling it after its production and before it reaches the consumer. These include such items as transportation, storage,

brokerage, and the profits of jobbers, wholesalers, and retailers. Together, they embrace the charges for all the services rendered, either by labor or capital, in bringing the article to the consumer. Since they relate to the production and distribution of those things which are necessary to life itself, they affect in a very real sense the public interest. Ordinarily, they may safely be left to be controlled, through competition, by the law of supply and demand. In times of peace the police powers residing in the State governments are sufficiently exercised by keeping competition free and open and by such inspection laws as may be necessary to protect the public. But the business of dealing in necessaries so vitally affects the whole public that, when occasion arises, it is within the power of the State governments to make such regulations as may be necessary to limit the charges and profits exacted to such as are fair and reasonable. And when, as an incident to the prosecution of a war, it becomes necessary the Federal Government may exert the same power. In support of these general propositions, the authorities cited at pages 18–33 of the Government's brief in *United States* v. *L. Cohen Grocery Company*, No. 324, are referred to.

Exercising this power, Congress by the act of October 22, 1919, has endeavored to regulate, within reasonable bounds, all charges made by those who handle or deal in necessaries. The obvious theory of the law is that those who engage in the production and distribution of necessaries are em-

ploying themselves and their capital in rendering the service which is necessary to bring such articles to the consumer. The prosecution of a war requires that all the resources of the Nation shall be conserved and utilized. The Government itself must have immense quantities of the things necessary for the subsistence of its armies. That portion of the population not drawn into the armies must exist in order that the armies may be supported. Nothing can be of more vital importance, then, than that neither the Government nor the public shall be required, under the stress of war, to pay extortionate prices for those things necessary to sustain life. Even in time of war, those who render service to the public are entitled to receive fair and reasonable compensation for their labor and a fair and just return for the capital employed. But no man has either an inherent or a constitutional right to speculate upon the misfortunes of his country or to extort exorbitant charges for services rendered to the public under the stress of war conditions. Neither the right to contract nor the right to the use of one's property is unlimited. It is, for instance, one of the recognized functions of Government to protect the public from extortion by the enactment of usury laws. One's right to use his money is of just as high an order as his right to the use of any other property, and yet no one questions the right of Government to fix a rate of interest in excess of which he may not lawfully charge. Upon the same principle, when necessary for the protection of the Nation and the public, he may be prohibited

from deriving an exorbitant profit from so much of his money as he chooses to use in dealing in the necessaries of life.

Of course, it is recognized that conditions will inevitably exist during a war which will make it impossible to produce commodities or transport or handle them at prices which have been fair and reasonable in times of peace. But this act does not prohibit remunerative charges on the part of any person connected in any way with either the production or the distribution of necessaries. It merely enacts that these charges shall be reasonable, in view of existing conditions. To this end, it treats both capital and energy employed in the production and distribution of necessaries as employed in a business impressed with a public interest, and enacts, in effect, that the charges made for the use of both capital and labor in this business shall be fair and reasonable and not exorbitant or extortionate. The language of the act covers the whole field. To prevent injurious speculations and manipulations is recited as one of the purposes of the act, and it is made unlawful "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." The charge made for the service rendered by himself or his capital by each successive handler of a commodity goes to make up the price which the ultimate consumer pays. The price which any handler, as the wholesaler, charges for the commodity when it goes to the next handler is the charge which he makes for the service rendered by him and his capital

added to the price which he paid to the previous handler. To determine, therefore, what charge any particular handler has made for the service rendered by him and his capital in handling or dealing in the commodity, there must be deducted from the price which he receives the price which he paid. The difference is the charge he has made for handling or dealing in the commodity. The act, therefore, is most comprehensive and condemns any unreasonable charge which is included in the price at which necessaries are sold. If, during a war, a dealer must pay more for the goods which he buys and for the labor he employs, and must thus use a larger capital to conduct his business, he will, of course, be entitled to make a larger charge for the service rendered by this larger capital and higher-priced labor. To be reasonable, however, his charges must be the same that would have been reasonable in time of peace, plus what is a reasonable compensation for the increased cost of conducting his business. The prices prevailing in time of peace, under free and open competition, may be assumed to be the standard of reasonableness. The usual corrective effect of competition, however, is much diminished under war conditions. The sudden withdrawal of so large a part of the labor of the country from productive operations and the simultaneous increase in the demand for necessaries to support the Army unsettles conditions which are ordinarily controlled by the law of supply and demand. The Government, then, may very well

protect itself and the public against this loss of competition and this temporary insufficiency of the law of supply and demand by requiring that, for producing and distributing necessaries, the charges shall be such as were usual and reasonable in peace times plus the amount necessary to cover increased cost and expense. In other words, the test shall be not how much is it possible to extort under the stress of war conditions, but how much, under existing conditions, will be reasonable compensation for the service rendered.

III.

Nature of the evidence upon which a jury must determine whether the prices at which necessaries are sold include an unreasonable charge.

The determination of what are reasonable charges in particular lines of business is not free from difficulties. But if we bear in mind, as suggested above, that what a dealer may add to the price which he has paid for his goods is such an amount as will be fair compensation for the use of the capital and labor which he has employed in handling the goods, it is entirely practicable—at least in most instances—to arrive at a safe conclusion. In determining what is negligence, juries are told that they must be governed by what is usually done by men of ordinary prudence under similar circumstances. What, in ordinary times, therefore, is a reasonable amount for a wholesaler to add to the price which he has paid for a given commodity can very readily be determined by show-

ing what has been usual and customary in that regard by merchants dealing in that commodity. If, then, it is shown that under war conditions it has been necessary for him to invest twice as much in the commodity and in the labor employed to handle it, this will be a guide to determining how much he may reasonably add to what was formerly a reasonable charge. Again, if under war conditions and war legislation, any rule for regulating such charges has been established by constituted authority and observed by dealers generally, this will furnish a safe standard for measuring charges subject to such changes as have been brought about by changing conditions. Again, if on account of the nature of a particular commodity and the ease with which it is disposed of, it has been customary in times of peace for dealers to charge a smaller profit than they charge on other commodities handled by them, it may safely be concluded that this difference should exist in times of war. If it is shown that, with respect to a particular commodity, actual experience has demonstrated that the expense of handling it, in connection with other commodities dealt in, is covered by adding to the cost price a certain per cent, this will furnish a guide to determining how much additional profit should be allowed as compensation for the capital employed. From some or all of the comparisons thus suggested a jury can usually reach a fair conclusion with reasonable certainty.

IV.

The task of determining what is a reasonable charge in the case of sugar is beset by as few difficulties perhaps as in the case of any other necessary article.

It happens that the long-continued practice of wholesale grocers in dealing with sugar and the practice of the Government during the early stages of the war in regulating such dealing makes it comparatively easy to determine what in April, 1920, was a reasonable charge for handling or dealing in sugar.

As shown above, sugar has been dealt in for many years by wholesale merchants on a very different basis from other and less staple articles. The proof, by witnesses on both sides, is that sugar has always been handled by such merchants on a very small margin, on a margin, indeed, too small to yield a profit if the merchant dealt in no other commodities. In other words, the demand for sugar is so constant, and the fluctuations in price so small, that, in the merchant's arrangement of his business, it is expected to bear a much smaller share of overhead expenses than other articles bear.

It is also true that during the early stages of the war the President, through agencies authorized by Congress, gave special attention to regulating the distribution of sugar. For this purpose, he acquired control of the supply of raw sugar and delivered it to the refiners at a given price, and then fixed the price which the refiner should charge the wholesaler as well as the price which the whole-

saler should charge the retailer and the retailer the consumer. Under the licensing system he was authorized to fix these prices and it was provided that the prices so fixed should be prima facie evidence in any proceeding brought in any court.

Whatever difficulties, therefore, may be encountered in arriving at reasonable charges for dealing in other commodities, it ought not to be difficult to reach a conclusion in the case of sugar.

V.

The evidence in this case abundantly supports the conclusion that the price of twenty cents per pound charged for sugar in each of the instances mentioned in the indictment included an unreasonable charge for handling or dealing in sugar.

The indictment charges that the sugar in question was purchased from the refiner at the price of 16 cents per pound and that the freight paid was 26.9 cents per 100 pounds, making the price 16.269 cents per pound, and that it was sold at 20 cents per pound, thus including a charge for handling or dealing in it, of 3.731 cents per pound, and that this was an unjust and unreasonable charge. The indictment avers also that $17\frac{3}{4}$ cents per pound was a just and reasonable charge and that any charge in excess of that was unjust and unreasonable. This, however, would seem to be surplusage. The averment that 20 cents was an unreasonable charge is the gist of the accusation and was sufficient. In other words, it is not necessary, in order to sustain this conviction, to establish that $17\frac{3}{4}$ cents was the limit of reasonable

charges. If the evidence establishes that anything less than 20 cents would be unreasonable, the offense denounced by the law has been committed. If it should appear that as much as 18 cents might have been charged without making the charge unreasonable, a sale at 20 cents would still be unlawful and the plaintiff in error would have committed the offense of which it is accused, although the Government may not have shown that it would be unreasonable to charge more than 17¾ cents, as averred in the indictment. The evidence does, in fact, support the claim than more than 17¾ cents was unreasonable. But I shall content myself with the effort to demonstrate that there can be no doubt that a charge of 20 cents was unreasonable, since that is all that is required to support the conviction.

The evidence referred to above shows that before the war wholesale merchants dealt in sugar on a very narrow margin. It was a staple which sold readily, with little expense, and was handled generally as a matter of advertisement and accommodation to customers. There was but little fluctuation in the price, which was from 4½ to 5 cents a pound. The wholesaler, according to one witness, usually added to the invoice price and freight from 35 cents to $1 per barrel of 350 pounds. This was a charge of from 10 cents to 28⅔ cents per 100 pounds for handling or dealing in the sugar. According to another witness quoted above the charge was about one-quarter of a cent per pound, or from 25 to 50 cents per 100 pounds, the difference being made

according to the standing of the customer and according to whether the sale was for cash or on credit.

When the Government acquired control of the raw sugars and fixed the charges of the various classes of dealers, it evidently took into consideration all the changed conditions. Instead of getting his sugar at from 4½ to 5 cents a pound, the wholesaler paid between 8 and 9 cents. Having to invest more money in the purchase of sugar, it was reasonable, of course, that, on that account alone, his margin of profit per pound should be larger. It was, in fact, fixed at 65 cents per 100 pounds, or $2.275 per barrel. Since sugar was scarce and it was almost impossible to supply the demand, the turnover was very rapid, and hence the money used in buying a particular lot of sugar was invested but a short time. However, the price of labor necessary to handle it had increased largely. At any rate, the charges customary before the war were more than doubled by the Government regulation. Indeed, the wholesaler was allowed to charge per 100 pounds about the average amount which he had previously been accustomed to charge per barrel. Before the war the reasonable charge for handling sugar, established by the custom of the merchants themselves, was one-quarter to one-third of a cent per pound on sugar costing from 4½ to 5 cents per pound. In view of this, there can scarcely be a doubt that the charge of 65 cents per 100 pounds, or about two-thirds of a cent per pound fixed by the Government on sugar costing from 8 to 9 cents per pound under war

conditions was fair and reasonable. This continued to be the prevailing charge until the time came when the Government no longer controlled the supply of raw sugars. The result was that there was no fixed price at which the wholesaler could get his sugar. The difference in cost at the various sources of production was such that no price for all sugars could be absolutely fixed. It followed that, in the fall of 1919, the prices at which wholesalers bought increased, so that when the sugar in this case was purchased by the plaintiff in error it cost 16 cents plus freight. In the meantime, however, the Government had again recognized that more money was required to handle sugar, and perhaps that conditions had changed in other respects, and the wholesaler's charge had been increased to 1 cent per pound, or $1 per 100 pounds. Formerly, sugar costing from 8 to 9 cents had borne a wholesaler's charge of 65 cents per 100 pounds. When the wholesaler had to deal in sugar costing 16 cents, he was allowed to charge as much as $1 per 100 pounds. This, of course, took care of much more than the interest or return upon the increased amount of capital. If the first charge was reasonable, the increase allowed was liberal. This $1 added to the cost and freight would have made the price to the retailer less than 17½ cents. As stated above, however, it is not at all necessary to show that the price of 17¾ cents mentioned in the indictment was the limit of reasonable charges. The plaintiff in error charged 20 cents, making a

margin between cost and freight and selling price of 3.73 cents per pound.

It is established that, under prewar conditions, in view of the manner in which sugar has always been handled, from one-third to one-fourth of a cent per pound was a reasonable charge on sugar costing from 4½ to 5 cents per pound, and that under war conditions, with sugar costing between 8 and 9 cents per pound, 65 cents per 100 pounds was reasonable. Between these figures and nearly 3¾ cents per pound there is a wide margin. There is, in fact, no effort in the testimony to justify any such increase. True, the cost of labor had enhanced, but we have here more than a tenfold increase in the charges made by the wholesaler, and there is no claim that there had been any such increase in the cost of labor or in anything else that went into the handling of sugar.

The conclusion that the price at which this sugar was sold included an unreasonable charge for handling or dealing in it is further verified by reference to the testimony as to the experience of the Creasy stores. The manner of doing business by these stores gives a good line on what experience has shown the actual cost of handling goods of this kind to be. These stores were conducted on something of a cooperative plan. The capital employed was furnished by the customers. Each customer deposited with the store $300. With the aggregate of these deposits as its capital, the business was conducted. No interest or dividend was to be paid to the depositor.

They were to get their returns on the money deposited in the form of decreased prices of the goods they bought. The plan was that the goods handled should be sold at a price over and above cost and freight sufficient to pay all the expenses of conducting the business, including one-half of 1 per cent of all sales to be paid to the general manager of all the stores. The business was conducted just as any other wholesale grocery, except that no traveling salesmen were employed. The amounts paid to the general manager of all the stores would correspond to and include at least a large part of the usual overhead incident to conducting a grocery business. The remainder of this overhead was taken care of out of the profits of the business. The whole scheme was based on charging, over and above cost and freight, such a percentage as would carry the business. The evidence is that these stores followed the customary plan of wholesale grocers of handling sugar and flour, and perhaps a few other staples, on a different basis from other commodities. Thus, the general plan was to add to the cost and freight 3 per cent. Of this, one-half of 1 per cent went to the general manager for his services and the other $2\frac{1}{2}$ per cent took care of the remaining expenses of conducting the business. In the case of sugar and flour, however, in line with the way these staples were handled by other wholesalers, a lower margin was adopted—only 1 per cent was added to the cost and freight and one-half of this went to the general manager. These stores have been conducted for a number of years and have al-

ways paid expenses on this basis. Since the charge for handling goods is put on a percentage basis, the plan works equally well when prices are low or when they are high. If the price of a given commodity doubles, and the cost of handling it also increases, there is no trouble, because with the price doubled the amount added as 3 per cent or 1 per cent is also doubled. It is true, of course, that a number of stores conducted under one general manager and upon this plan may, and doubtless do, keep their expenses somewhat below the expenses of the ordinary wholesaler, but the experience of these stores, at least, throws light on what charge is necessary to meet the expenses of conducting a business. Under this plan, 3 per cent on commodities in general and 1 per cent on sugar has been found to be sufficient both in peace times and during war.

In this case, 100 pounds of sugar, including freight, cost $16.29. The Government contends that a charge of 1 cent a pound, making the selling price $17.29, would be reasonable. The charge thus added would be a fraction over 6 per cent. Certainly, if the Creasy stores can be made to pay expenses by adding 1 per cent, there can be but little doubt that 6 per cent will provide for expenses and leave a reasonable profit. What the plaintiff in error actually did, however, was in selling 100 pounds of sugar to charge $20 instead of $17.29, as the Government insists it should have done, and this, added as its charge for handling or dealing in the sugar, is about 23 per cent.

Certainly, the evidence in this case amply supports the conviction, unless the plaintiff in error can sustain its contention that it is entitled to add its charge for handling, not to the cost of the sugar, but to its market value at the time of the sale.

VI.

The rate or charge made for handling or dealing in commodities is the excess of the selling price over cost and freight and not over market value at time of sale or replacement value.

It does not seem to be seriously insisted that a charge of nearly 3¾ cents per pound by a wholesaler for handling or dealing in sugar is either a reasonable charge or in accord with what has always been recognized as fair and just. The real contention seems to be that, although the charge allowed by the Government is a reasonable charge, the basis upon which this must be calculated to support the conviction in this case is erroneous. There is evidence to the effect that between the time this sugar was bought and sold the price of sugar had advanced to such an extent, that, in order to replace it in stock, the plaintiff in error would have been compelled to pay more than 20 cents per pound. It is therefore insisted that the reasonable rate or charge might properly be added to the market value of sugar at the time of the sale—that is, the amount which it would then have cost the wholesaler to buy an equal quantity.

It is said that this course is always followed by wholesalers in fixing the price at which they sell,

and that this is necessary, for the reason that the prices of various commodities fluctuate in the markets; that if the price of a commodity goes down after the wholesaler buys, he is forced by competition to meet the market and thus sustain a loss; and that to equalize this in the course of his business he must take advantage of a corresponding rise in commodities when he sells the latter. A number of witnesses were introduced to prove that in prewar times wholesalers dealt with sugar in this way. (Rec., pp. 41–65.) An examination of this testimony, however, discloses that, for several reasons, this cut very little figure in the profits which wholesalers made on sugar. In the first place, it was a staple article, the demand for which was steady. The result was that it was not long kept in stock, but was rapidly turned over. The fluctuations in the market were very slight, rarely being more than 10 points between the time of purchase and sale by the wholesaler. It does appear that there was a somewhat general effort among grocers to get the advantage of any increase in market price when they could. This increase, however, was always small, on account of the slight fluctuations and quick sales, and besides the testimony shows that, for practical reasons, it frequently could not be obtained. A particular grocer buying at an advanced price had to sell in competition with other grocers, some at least of whom had in stock sugar purchased at the lower prices and continued to sell on the basis of those prices. In order to keep his trade satisfied the

wholesaler had to sell as cheap as his competitor, and hence frequently could not afford to take advantage of the market. Under these conditions the witnesses all agree that in normal times wholesale grocers dealing in sugar never had occasion to apply the so-called rule to such conditions as existed in the latter part of 1919 and the early part of 1920, when it is said that prices advanced until they reached about 28 cents per pound. It can scarcely be said, therefore, that there was any established custom or rule among grocers that would apply to such conditions. Some of the witnesses themselves recognize this and shy at claiming that it would be fair or reasonable to take advantage of such great advances in the market price. Thus, one witness says:

> A dealer can naturally take into consideration all circumstances surrounding the sale he is making. If the profit he is going to make would be exorbitant profit, an unreasonable profit, he would not take advantage of it. (Rec., p. 42.)

And another, confronted with the actual claim made in this case, said:

> If I bought at sixteen cents and had that sugar in town, and the next lot was going to cost me twenty-eight, I would not expect to get twenty-nine or thirty. I don't know that we would get an unreasonable price, you think, twenty-nine, might be unreasonable—probably would be. According to the rule laid down a while ago, I ought to get all I could, but we take into consideration the condition

> of the times, we can't go to the trade and demand the price. That would be out of reason. We haven't had that condition to contend with and I couldn't tell you whether we would or not. That condition never came up so far as fifteen-cent sugar jumping to thirty cents. (Rec., p. 53.)

In other words, the witnesses themselves practically admit that the custom prevailing in normal times, when fluctuations in the market were slight, if followed under such conditions as existed when the sales in this case were made, would result in such unreasonable profits that the honest grocer's conscience would not permit him to take them. This emphasizes the necessity for just such a law as is involved here. If, without the restraining hand of the law, it was possible for the dishonest or avaricious grocer to make charges which the honest grocer would not make, the need of legislation was imperative. The necessity of legislation arose from the scarcity of sugar. In ordinary times, open and free competition will regulate the market, and in the case of a staple like sugar there will be but little fluctuation. Under such conditions, if a particular grocer, having bought sugar which has since advanced in price, chooses to withhold it from the market until his competitors have sold the low-price sugar they have in stock and thus sell his own on the basis of the new market, there can be but little detriment to the public. But the object of this legislation, on account of the scarcity of sugar, was not only to regulate

prices but to promote the prompt distribution of sugar. The act itself contains stringent provisions against hoarding. To prevent speculation is one of the declared objects of the act. The business, therefore, with which Congress was dealing was a business in which it was expected and intended that sugar should be bought and immediately sold. The purposes of the act would have been as much frustrated by encouraging wholesalers to hold their sugar in order to reap expected profits from an advancing market as by permitting them to make exorbitant charges. Both purposes were accomplished by treating the wholesaler and his capital as rendering a service to the public in distributing necessaries and providing that, for that service to the public, only reasonable and just compensation should be demanded. Both purposes would be frustrated if it was within the power of the dealer, by withholding from the market his sugar, to reap a large profit from a rapidly advancing market in addition to the reasonable and just compensation for handling or dealing in sugar.

Moreover, the contention that the wholesaler's charge should be based upon replacement values and not upon cost involves a contradiction in terms. The difference between what a merchant pays for his goods and what he sells them for is, in fact, what he receives for handling or dealing in them, whether we call it his gross profit or the charge which he makes for handling or dealing. To illustrate by the present case: The plaintiff in error bought sugar which cost

him 16.29 cents per pound. Seven or eight days later he sold it for 20 cents per pound. The difference was received by him as a result of handling or dealing in this sugar. It is wholly immaterial whether it is called a gross profit, compensation for his capital and labor, or a charge which he has made for buying, handling, and selling.

No one will deny that a merchant who, on account of trade conditions, has found himself unable to dispose promptly of his stock, and has thus been compelled to carry for a long time his goods, may fairly sell them, if market conditions subsequently enable him to do so, at something in advance of what would have been a fair price at the time he bought them. This is because he is entitled to some compensation, if he can get it, for the capital that has been invested and the expense of keeping his goods on hand. But in the case of goods which are bought and then sold in a few days, no such consideration enters into the matter. Nothing is so vital to the prosecution of a war or to keep the country in a condition, during the period of an armistice, to resume hostilities, if necessary, as the production and fair distribution of those things which are necessary to sustain life. There is no more striking example of a business impressed with a public interest than the business of handling or dealing in necessaries during such time. If the Government can not properly treat both the capital and the labor employed in conducting this business as subject to regulation and may not deny to both the right to exact exorbitant charges for the service ren-

dered, it is, indeed, powerless. The corrective effect of competition has been greatly diminished by the necessity which forced the Government, in order to raise armies, to withdraw millions of men from productive fields of labor. This made it necessary and proper that the Government should protect itself and the public from this loss of competition. It could do this no more effectively than by saying that labor and capital engaged in distributing necessaries should receive only just and reasonable compensation.

It is argued that when a merchant buys goods, and the market value of those goods enhances while he holds them, the increased value becomes his property and that the Government can not take this away from him by requiring him to sell at a price below what it would cost him to replace the goods. But profits arising from enhancement in values are mere paper profits and do not actually accrue to the owner of the property until realized by sale. This is constantly recognized in determining what is income for the purpose of taxation. This war measure which we are considering is directed at those who make a business of buying and selling necessaries. It does not compel any man to enter that business. It applies only to those who voluntarily buy for the purpose of selling. It does not compel anyone to part with anything he buys without a fair and reasonable compensation. It simply says to the merchant who buys necessaries for the purpose of selling them that in the charge which you make for handling and dealing in these necessaries you

shall not include more than a reasonable profit. It simply regulates the use which may be made of property consisting of necessaries purchased for the purpose of being sold. The Government only does to these dealers what every State Government in the Union does, even in times of peace, to every man who owns money by saying to him, if you loan this money you shall only charge a given rate of interest.

It is said that the Act of preventing the wholesale dealer from realizing a profit arising from advances in the market is a taking of his property for a public use without compensation. The answer to this is, that this statute does not in any sense, take property. It merely regulates the use of property. It is an exercise by the Federal Government, for the purposes of the war, of police power, and the constitutional prohibition against taking property without compensation has no relation whatever to the lawful exercise of the police powers of Government. *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146; *Jacob Ruppert* v. *Caffey*, 251 U. S. 264.

VII.

Objections to rulings of the court admitting and excluding evidence.

One objection is made to the action of the court in admitting evidence, and one because of the exclusion of other evidence.

Over the objection of the plaintiff in error the Government was permitted to prove by the fair-price

commissioner how the prices fixed by the Government as fair and reasonable had been arrived at. This witness, an experienced wholesale grocer, testified, independently of the action of the fair-price committee, to facts tending to show that the prices fixed were fair and reasonable. He also detailed the proceedings of the fair-price committee showing what was considered and that the committee was controlled by the considerations stated by him as the reasons for his own conclusions that the prices fixed were reasonable. Objection was made to his testimony so far as it related to the action of the fair-price committee. As shown in the foregoing statement of the case, the court admitted the evidence but stated at the time, in effect, that it would go to the jury not as establishing the reasonableness of the prices fixed, but to be considered by them in connection with all the other evidence. This was certainly as favorable a ruling as could have been asked. The act authorized the President to make all regulations necessary for its proper enforcement, and specifically provided that he should have the power to fix reasonable prices, which should be prima facie evidence in any proceeding in court. Moreover, the testimony of the witness was but the detailing of matters which he had previously considered as an official and upon which the testimony which he was then giving as a witness was based. This testimony was clearly admissible, particularly in view of the instructions subsequently given to the jury as to its weight and effect.

On the other hand, the plaintiff in error offered to prove that some agent of the Department of Justice had, in August, 1919, written letters to wholesale merchants in Texas, in which he told them that replacement values should be used in fixing prices. It is not shown that this statement was authorized by the President or by the Attorney General; that at the time the sales in this case were made the plaintiff in error had ever heard of them, or that it was in any way misled by them. It is difficult to perceive upon what principle this evidence could have been admitted, and the court was clearly right in excluding it.

VIII.

Objections to the charge.

There was an objection to that part of the charge quoted hereinbefore referring to the fixing of prices by the President through the agency of the Attorney General and the fair-price commission at Atlanta. After referring to the fact that evidence had been introduced as to what these agencies of the President had determined to be a fair and just rate in handling or dealing in sugar at wholesale, the court said:

> That evidence has been admitted before you for what you think it is worth. It is not conclusive; it is not a judgment; the Oglesby Grocery Company was never called before either one to have a hearing about it so that a trial could be had to fix the thing. It is admitted only as prima facie evidence as to what the Attorney General and the fair-price commission decided was just and reasonable. (Rec., p. 76.)

From what has been said above it is plain that the court would not have been in error if the jury had been instructed that the prices fixed were to be treated as prima facie reasonable and just. The court, however, did not go that far. The utmost weight that could be given to the evidence under his instruction was to treat it as "prima facie evidence" *as to what the Attorney General and the fair-price commission decided was just and reasonable.* That this action in fixing prices was a circumstance that could be looked to can scarcely be doubted. Under the instruction given this was all the weight it was permitted to have with the jury. The instruction complained of was, in fact, more favorable to the plaintiff in error than it was entitled to.

Numerous objections are made based on the refusal of the trial judge to instruct the jury that replacement value and not cost should be used as the basis for fixing reasonable charges. The instruction to the contrary actually given is also complained of. The Government's answer to these criticisms of the trial judge is found in the argument just made upon the contention that replacement values and not cost should be used to determine what is a reasonable rate or charge. If that argument is sound, the instructions given by the judge were correct.

The other objections to the charge raise in various forms the question of the constitutionality of the act in question. These contentions have been fully met by the Government's argument in the briefs in other

cases now pending before the court and referred to and adopted in the beginning of this brief. They are also most admirably met and answered in the opinion of District Judge Sibley in this case, found in the record at pages 4–8.

CONCLUSION.

It is respectfully submitted that there is no error in the judgment of the court below and it should be affirmed.

WILLIAM L. FRIERSON,
Solicitor General.

OCTOBER, 1920.

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OGLESBY GROCERY COMPANY *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 457. Argued October 19, 20, 1920.—Decided February 28, 1921.

Decided upon the authority of *United States* v. *Cohen Grocery Co.*, *ante*, 81.
264 Fed. Rep. 691, reversed.

WRIT of error to a conviction and sentence under § 4 of the Food Control Act, for selling sugar for excessive prices.

Mr. Edgar Watkins for plaintiff in error.

The Solicitor General for the United States.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The plaintiff in error is here to reverse a verdict and sentence against it on an indictment containing four counts charging it with four separate violations of the fourth section of the Lever Act. At the close of all the testimony it requested the court to charge the jury that the provisions of that section relied upon were repugnant to the Constitution of the United States, on the grounds, among others, which were held to be sound in the *Cohen Grocery Co. Case*, this day decided, *ante*, 81.

It is therefore unnecessary for us to do more than to apply to this case the rulings made in the *Cohen Case*, and, in consequence of doing so, to reverse the judgment

with directions to set aside the sentence and quash the indictment, and it is so ordered.

Reversed.

MR. JUSTICE PITNEY and MR. JUSTICE BRANDEIS concur in the result.

MR. JUSTICE DAY took no part in the consideration or decision of this case.